77-1697
No.

Supreme Court, U. S.
FILED
MAY 26 1978
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1977

RAY MARSHALL, SECRETARY OF LABOR, PETITIONER

v.

DANIEL CONSTRUCTION COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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The Solicitor General, on behalf of the Secretary of Labor, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, pp. 1a-40a) is reported at 563 F.2d 707. The district court opinion is not officially reported (App. D, *infra*, pp. 45a-48a).

JURISDICTION

The judgment of the court of appeals (App. B, *infra*, pp. 41a-42a) was entered on November 21, 1977. A timely petition for rehearing was denied on

December 30, 1977 (see App. C, *infra*, pp. 43a-44a). On March 22, 1978, Mr. Justice Powell extended the time within which to file a petition for a writ of certiorari to and including May 29, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

QUESTION PRESENTED

Whether, in implementing the Occupational Safety and Health Act of 1970, the Secretary of Labor may proscribe employer retaliation against an employee for his refusal to perform particular tasks reasonably believed to present an immediate danger imperiling life or limb.

STATUTE INVOLVED

Section 11 of the Occupational Safety and Health Act of 1970, 84 Stat. 1603, 29 U.S.C. 660(c)(1), provides in pertinent part:

> (c)(1) No person shall discharge or in any manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this Act or has testified or is about to testify in any such proceeding or because of the exercise by such employee on behalf of himself or others of any right afforded by this Act.

STATEMENT

This suit was brought by the Secretary of Labor under Section 11(c)(1) of the Occupational Safety and Health Act of 1970, 29 U.S.C. 660(c)(1), which

forbids an employer to "discharge or in any manner discriminate against any employee * * * because of the exercise by such employee * * * of any right afforded by this Act."[1] The Secretary alleged that respondent unlawfully discharged one of its employees, Jimmy Simpson, in retaliation for the exercise by him of a statutory right "afforded by this Act," that is, the right to refuse to perform particular tasks reasonably believed to present an immediate danger imperiling life or limb. The remedy sought was reinstatement and back pay.

Because the proceedings were dismissed for failure to state a claim, the underlying facts were not fully developed. It was, however, alleged that Jimmy Simpson was employed by the respondent on a construction site in Carrollton, Georgia, and that on No-

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[1] Section 11(c)(2) of the Act, 29 U.S.C. 660(c)(2), in pertinent part, provides that:

> [a]ny employee who believes he has been discharged or otherwise discriminated against by any person in violation of this subsection may, within thirty days after such violation occurs, file a complaint with the Secretary alleging such discrimination. * * * The Secretary shall cause such investigation as he deems appropriate. If * * * the Secretary determines that * * * this subsection ha[s] been violated, he shall bring an action in any appropriate United States district court against such person. In any such action the * * * courts shall have jurisdiction * * * to restrain violations of [11(c)(1)] and order all appropriate relief including rehiring or reinstatement of the employee to his former position with back pay.

Section 11(c)(3), 29 U.S.C. 660(c)(3) directs the Secretary to notify the complainant of his determination under Section 11(c)(2) within 90 days of the complaint's receipt.

vember 21, 1974, he "refused to work under conditions which reasonably caused him to conclude that there was a real and immediate danger of death or serious injury to him if he performed his assigned work" (J.A. 4).[2] The Secretary further alleged that, on the same day, Simpson was discharged and that respondent refuses to re-hire him (*ibid.*).

In support of his complaint, the Secretary relied on a published regulation, interpreting Section 11(c)(1) of the Act, 29 C.F.R. 1977.12 (Appendix E, *infra*, pp. 49a-58a). In pertinent part, the Department of Labor regulation provides:

> (b)(1) * * * review of the Act and examination of the legislative history discloses that, as a general matter, there is no right afforded by the Act which would entitle employees to walk off the job because of potential unsafe conditions at the workplace.
>
> * * * * *

[2] The court of appeals was told in the Department's brief (p. 8, n. 3) that the factual background appeared to be as follows:

> * * * [that] Simpson was employed as an ironworker connecting structural steel on a high-rise skeleton; that on the morning of November 21, 1974 he was a member of a five-man crew working at about the 50-foot level; that another crew was working at heights of 150 to 200 feet; that shortly after starting work both crews independently came to the ground because of high winds specifically communicated to the employer; that Daniel without investigating the asserted danger ordered them back to work; and that Simpson was fired for refusing to return to that specific task until the winds abated.

(2) However, occasions might arise when an employee is confronted with a choice between not performing assigned tasks or subjecting himself to serious injury or death arising from a hazardous condition at the workplace. If the employee, with no reasonable alternative, refuses in good faith to expose himself to the dangerous condition, he would be protected against subsequent discrimination. The conditions causing the employee's apprehension of death or injury must be of such a nature that a reasonable person, under the circumstances then confronting the employee, would conclude that there is a real danger of death or serious injury, and that there is insufficient time due to the urgency of the situation, to eliminate the danger through resort to regular statutory enforcement channels. In addition, in such circumstances, the employee, where possible, must also have sought from his employer, and been unable to obtain a correction of the dangerous condition.

2. The district court dismissed the complaint, holding that the regulation was unauthorized since "[t]he statute clearly provides a[n exclusive] method for dealing with the threat of imminent danger through notification to the Secretary of the condition with a request for immediate inspection" (App. D, *infra*, p. 48a).[3]

[3] Section 8(f)(1) of the Act, 29 U.S.C. 657(f)(1), in pertinent part, provides:

> [a]ny employee * * * who believe that a violation of a safety or health standard * * * or * * * an imminent danger exists, may request an inspection by giving notice

On appeal by the Secretary, the court of appeals affirmed by a divided vote. The majority applied a narrow reviewing standard,[4] and conceded both the regulation's "beneficent intent" and its design "to achieve an end consistent with the purposes of the Act" (App. A, *infra*, pp. 20a, 23a, n.21). Nevertheless, the court concluded that "the regulation is invalid because it is beyond the Secretary's grant of authority under the enabling provision" (*id.* at 7a).

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to the Secretary * * *. If upon receipt of such notification the Secretary determines there are reasonable grounds to believe that such violation or danger exists, he shall make a special inspection * * * as soon as practicable, to determine if such violation or danger exists. * * *

[4] The court of appeals noted (App. A, *infra*, p. 7a):

> [t]he validity of the Secretary's regulations "will be sustained so long as they are 'reasonably related to the purposes of the enabling legislation'. . . ." *Mourning* v. *Family Publications Service, Inc.*, 411 U.S. 356, 369, 93 S.Ct. 1652, 1661, 36 L.Ed. 2d 318 (1973), *quoting Thorpe* v. *Housing Authority*, 393 U.S. 268, 280-281, 89 S.Ct. 518, 525, 21 L.Ed. 2d 474 (1969). Moreover, as the Secretary's interpretation is entitled to "great weight," *Brennan* v. *Southern Contractors Service*, 492 F.2d 498, 501 (5th Cir. 1974), Daniel has the burden of proving that the Secretary's regulation is inconsistent with his congressional grant of authority. * * *

The court of appeals also noted (App. A, *infra*, p. 6a):

> [t]he district court dismissed the Secretary's complaint under Federal Rule of Civil Procedure 12(b)(6). We review this appeal under the "accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief."

The court's holding rests upon its reading of the Act's legislative history "in relation to preventing imminent dangers" and its conclusion, based upon this legislative history, that "Congress gave the federal courts the sole authority to enjoin an * * * employer's business" (*id.* at 10a, 19a).[5] The Secretary's regulation was rejected because, in the court's view, its effect would be to transfer to employees the power to enjoin an employer's business which Congress had placed solely in the courts.[6]

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[5] Section 13 of the Act, 29 U.S.C. 662, in pertinent part, provides:

> (a) [t]he United States district courts shall have jurisdiction, upon petition of the Secretary, to restrain any conditions or practices * * * which are such that a danger exists which could reasonably be expected to cause death or serious physical harm immediately or before the imminence of such danger can be eliminated through the enforcement procedures otherwise provided by this Act. * * *

[6] The Court found that "in relation to preventing imminent dangers, OSHA expressly provides the contours of the part that workers play," as follows (App. A, *infra*, pp. 10a-11a):

> (1) [t]hey may notify the Secretary of those conditions and practices that they believe present an imminent danger and request an immediate inspection, and (2) they may provide the inspector with information during the investigation. Before an imminent danger is enjoined, however, four independent judgments must be integrated in the decision-making calculus: (1) The Secretary must conclude that the worker's notice provides reasonable grounds to believe that an imminent danger exists. (2) An OSHA inspector must conclude upon inspecting the workplace that the danger cannot be prevented through normal enforcement procedures but requires immediate

Judge Wisdom dissented. He pointed out that the Secretary's regulation "has filled a dangerous gap" in the Act's protection of employees by providing "freedom from exposure to danger" (App. A, *infra*, pp. 28a-29a). Judge Wisdom noted that "[t]he importance of the majority's holding extends far beyond this case. The effect of the holding is to force an anti-social dilemma on workers who face imminent danger of a hazard then and there occurring and have no immediate relief available but to refuse to continue working in an unsafe place" (*id.* at 26a). Contrary to the majority, Judge Wisdom believed the Secretary was empowered to eliminate this "hard choice" on the ground that the regulation embodies "one of the 'other rights' mentioned in 11(c)(1), a right to safe conditions implicit in the entire law" (*id.* at 24a, 29a). He added that "the regulation can be seen as an essential part of the employee enforcement envisioned by Congress and protected by [Section 11(c)(1)]." Judge Wisdom concluded that the right embodied in the regulation "increases the incentive" to request inspection and affords "essential interim protection

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injunctive relief and recommend to the Secretary that he seek relief. (3) The Secretary must conclude that the inspector is correct and proceed to federal court. (4) A federal district court must find that an imminent danger exists at the worksite such that requires immediate injunctive relief. At no point does the Act permit workers to make a determination that a dangerous condition exists *in fact* and that their employment or their employer's business operations may be halted by their refusal to work.

while the statutory remedies are being followed" (*id.* at 29a-30a).

Judge Wisdom found "[n]o clause in the Act lead[ing] to the conclusion that the statutory system is the exclusive remedy" for employees faced with imminently dangerous conditions (*id.* at 32a). Similarly, he found the legislative history proffered in support of the majority opinion unpersuasive and disagreed with the majority's inferred "congressional prohibition" against the right's existence (*ibid.*).

REASONS FOR GRANTING THE PETITION

1. This case presents an important question concerning the Secretary of Labor's authority to assure the protection of workers faced with imminently dangerous circumstances and to maintain open channels of communication with employees as an aid to his enforcement efforts under the Occupational Safety and Health Act.

It is self-evident that conceding to workers a right to refuse work in perilous conditions—although the employee must often forego pay, and his action is not directly compulsive—would create an additional incentive to correct safety hazards. At the same time, such a rule tends to assure that employees will not be prevented or discouraged from reporting dangerous conditions to the Department of Labor. And, most important, a limited right to self-help is necessary to deal with extreme situations for which the administrative and judicial processes are too slow, unless

workers are to be left with the cruel choice between their safety and their job.

No doubt, as the Secretary's regulation itself stresses, the occasions when a worker is confronted with such an acute dilemma must be relatively few in number. But such situations are not so rare that they can be passed over as presenting no significant problem. Perhaps especially in the construction industry, pressures on employers to meet deadlines or suffer substantial financial penalties must sometimes tempt them to disregard unsafe conditions for their workers. Indeed, we are advised by the Department of Labor that in fiscal year 1977 alone some 70 justified complaints were received from employees alleging that they were discharged or otherwise penalized because they declined to perform assigned tasks which exposed them to imminent peril.[7]

Plainly, the question whether an employee may protect himself from immediate danger only at the risk of losing his job is a pressing one. The holding of the court of appeals defeats the goal of safe employment in the many cases where formal procedures are ineffective for the immediate emergency. In these circumstances, review by this Court is warranted even in the absence of a conflict among the circuits.[8]

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[7] It should not, however, be supposed that the Department is predisposed to find merit in such complaints. On the contrary, very much the larger number have been rejected as unsubstantiated.

[8] But see *Phillips* v. *Interior Board of Mine Appeals*, 500 F.2d 772, 778 (C.A.D.C.), certiorari denied, *sub nom. Kentucky Carbon Corp. et al.* v. *Interior Board of Mine Appeals*, 420 U.S. 938. In that case, the court of appeals held the right of an employee to refuse work in unsafe circumstances to be implied under 30 U.S.C. 820(b)(1), the analogous anti-discrimination provision of the Federal Coal Mine Health and Safety Act of 1969, 83 Stat. 742, 30 U.S.C. 801 *et seq.* The 1977 amendments to the Coal Mine Act broadened this provision "[while] insur[ing] the continuing vitality of the various judicial interpretations of section 110 [citing *Phillips*] * * * which are consistent with the broad protections of the bill's provisions * * *." S. Rep. 95-181, 95th Cong., 1st Sess. 35-36 (1977).

We additionally note that the district courts are in conflict on the existence of the right under the Occupational Safety and Health Act. *E.g.*, *Usery* v. *Babcock & Wilcox*, 424 F. Supp. 753 (E.D. Mich.) (right upheld; *Usery* v. *Whirlpool Corp.*, 416 F. Supp. 30 (N.D. Ohio) (right denied), appeal pending, C.A. 6.

2. Of course, if the text and legislative history of the Occupational Safety and Health Act foreclosed the remedy announced by the Secretary's regulation, these concerns must be addressed to Congress and not to the Court. But, in our view, the court of appeals erred in reading the relevant materials as conclusive here.

Considering the central purpose of the legislation to assure safe working conditions, only the clearest evidence would justify the conclusion that an employee confronted with a truly serious and imminent hazard may not, except on pain of retaliatory action by his employer, temporarily absent himself from the danger until it subsides or is corrected, or it is investigated and ordered to be abated. Nor should the Secretary of Labor's interpretative regulation, restrained and reasonable as it appears on its face, be invalidated unless Congress has very plainly spoken

otherwise. See, *e.g.*, *Mourning* v. *Family Publications, Inc.*, 411 U.S. 356, 369.[9]

Certainly, the text of Section 11(c)(1) does not foreclose the Secretary's regulation. In relevant part, it provides that "[n]o person shall discharge or in any manner discriminate against any employee • • • because of the exercise by such employee • • • of any right *afforded by this Act*" (emphasis supplied). The Secretary has construed this broad language mindful of both the employee's implied right to a safe workplace and the Act's general mission to eliminate "so far as possible" employee exposure to unsafe conditions in part through the employee's right to request OSHA inspections when he believes dangerous conditions exist. 29 U.S.C. 651, 651(1), 657 (f)(1). To further this statutory scheme, and also to "prevent [the Secretary's] channels of information from being dried up," *National Labor Relations Board* v. *Scrivener*, 405 U.S. 117, 122, the Secretary has concluded that Section 11(c)(1) necessarily protects the step which, in exigent circumstances, must precede effective use by an employee of his express right to alert the Secretary that a perilous condition immediately threatens his life.

Nor does the normal remedial procedure, requiring judicial intervention, necessarily foreclose the Secre-

[9] The Secretary, as the majority of the court of appeals recognizes (App. A, *infra*, p. 6a-7a), is expressly authorized by the Act to "prescribe such rules and regulations as he may deem necessary to carry out [his] rsponsibilities under [the Act]." Section 8(g)(2), 29 U.S.C. 657(g)(2).

tary's regulation. The worker can compel no corrective action. Indeed, sometimes—as apparently in this case (see note 2, *supra*), the hazard, caused by unusual weather conditions, will naturally abate. He simply may temporarily avoid subjecting himself to an immediate peril. And, under the regulation, he may absent himself only when the hazardous condition puts him at risk of "serious injury or death," when "there is insufficient time due to the urgency of the situation, to eliminate the danger through resort to regular statutory enforcement channels," and, where that is possible, only after he has unsuccessfully "sought [correction] from his employer." Moreover, the worker is protected only if he acts "in good faith" and if his apprehended fears are objectively "reasonable." For our part, we see no unavoidable conflict between such a limited rule and the statutory scheme for compulsory abatement of safety hazards.

The court below rested its decision primarily on its reading of the Act's legislative history. The linchpin of the majority opinion is the statement that "[t]wo principal series of events which occurred during Congress's [sic] consideration of the Act cause us to conclude that Congress did not intend that OSHA grant workers a right to walk off the job when faced with what they believe to be a dangerous work condition" (App. A, *infra*, p. 12a). Primarily for the reasons articulated in the dissent, however, we believe the court was misled.

The court emphasized that the full House substituted the Steiger bill which did not contain a "strike

with pay" provision for the bill which did, that the sponsor of the Senate-passed bill noted it contained an express employee right to request agency inspections in lieu of a "strike with pay" provision, and that the House acceded in conference to the Senate's provision for an employee right to request inspections (App. A, *infra*, pp. 12a-15a). But this overlooks the fact that the principal difference between these two bills, on which the House almost exclusively focused and presumably on which its choice rested, was the Steiger bill's provision for standard-setting and adjudicatory agencies independent of the Secretary of Labor.[20] It is, moreover, not self-evident that congressional antipathy toward the "strike *with pay*" provision indicates a like hostility to the limited right asserted here. As the dissent pointed out (App. A, *infra*, p. 33a), the "strike with pay" provision is so different from the implicated right that the "rejection of that proposal has little bearing on this [right]."[21]

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[20] Committee Print, Legislative History of the Occupational Safety and Health Act of 1970, 92d Cong., 1st Sess. 763, 770, 779-780, 786, 831, 837-838, 854, 880, 988-991, 1069-1070 (June 1971).

[21] Judge Wisdom specifically delineated those differences (App. A, *infra*, pp. 32a-33a):

> [t]he provision was located in the section dealing with federal research on toxicity. It provided that employers or employees could request an HEW determination of the toxicity of any materials in their workplace. Within sixty days of that determination, the employer could not require that an employee be exposed to greater than toxic concentrations unless the employee were informed of the hazards, the symptoms associated with the substance, and proper precautions for dealing with it. Furthermore, the employer had to furnish the employee with proper personal protective equipment. If those conditions were not met, an employee could be subjected to the toxic substance only if he could "absent himself from such risk of harm for the period necessary to avoid such danger without loss of regular compensation for such period."
>
> * * * [The provision] was written to deal with problems of increasing concentrations of toxic substances, not immediate hazards. It spoke only of toxicity dangers, it did not require an imminent threat to life, and it was a remedy to be invoked only after 60 days without employer action. *Unlike that provision, the regulation in question does not provide for an absence with pay* [emphasis supplied].

Similarly, the majority's decision traced the history of House and Senate proposals permitting administrative closings of workplaces which present imminent dangers to employees. The ultimate rejection of these proposals and the substitution of agency authority to seek court injunctions was said to reflect congressional concern "that workers might * * * attempt unduly to influence OSHA inspectors if these officials were given the authority to issue administrative [shutdown] orders" (*id.* at 16a-19a). But the power to order a shutdown and the right temporarily to decline working in immediately hazardous conditions are hardly parallel. The potential for abuse of the limited right recognized by the Secretary is severely curtailed by the strict conditions imposed and,

not least, by the fact that the employee must be prepared to forego pay if necessary to escape the hazard."[12]

In our submission, neither the text nor the legislative history of the Safety and Health Act precludes the very limited right which the Secretary of Labor has recognized. In sum, the regulation at issue is a permissible means of implementing the Act.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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MAY 1978.

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[12] As the dissent pointed out (App. A, *infra*, p. 29a), the right neither entitles an employee to walk off the job since the employer can assign available alternative work, nor guarantees pay since employers can take the refusing employee off the clock if no alternative work is available; it "merely wins [him] freedom from exposure to danger."

APPENDIX A

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 76-1465

F. RAY MARSHALL, Secretary of Labor, United States Department of Labor, APPELLANT

v.

DANIEL CONSTRUCTION COMPANY, INC.,
DEFENDANT-APPELLEE

Nov. 21, 1977

Rehearing and Rehearing En Banc

Denied Dec. 30, 1977

Appeal from the United States District Court
for the Northern District of Georgia

Before WISDOM, CLARK and RONEY, Circuit Judges.

CHARLES CLARK, Circuit Judge:

Pursuant to 29 U.S.C. § 660(c)(2)[1] of the Occu-

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[1] 29 U.S.C. § 660(c)(2) provides:

> Any employee who believes that he has been discharged or otherwise discriminated against by any person in violation of [29 U.S.C. § 660(c)(1)] may, within thirty days after such violation occurs, file a complaint with the Secretary alleging such discrimination. Upon receipt of such complaint, the Secretary shall cause such investigation to be made as he deems appropriate. If upon such investigation,

pational Safety and Health Act of 1970, *id.* §§ 651 *et seq.*, the United States Secretary of Labor (Secretary) filed a complaint in the district court alleging that defendant, Daniel Construction Company (Daniel), had discharged one of its employees, Jimmy D. Simpson, for refusing to perform a task "under conditions which reasonably caused him to conclude that there was a real and immediate danger of death or serious injury to him if he performed his assigned work," [2] and that, since Simpson's refusal to work under these conditions was protected by 29 C.F.R. § 1977.12 (1976),[3] Daniel violated 29 U.S.C. § 660

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the Secretary determines that the provisions of [29 U.S.C. § 660(c)(1)] have been violated, he shall bring an action in any appropriate United States district court against such person. In any such action the United States district courts shall have jurisdiction, for cause shown to restrain violations of [29 U.S.C. § 660(c)(1)] and order all appropriate relief including rehiring or reinstatement of the employee to his former position with back pay.

[2] The precise facts of the occurrence were not before the district court, and we decline to consider them for the first time here.

[3] 29 C.F.R. § 1977.12 (1976) provides:

(a) In addition to protecting employees who file complaints, institute proceedings, or testify in proceedings under or related to the Act, section 11(c) also protects employees from discrimination occurring because of the exercise "of any right afforded by this Act." Certain rights are explicitly provided in the Act; for example, there is a right to participate as a party in enforcement proceedings (sec. 10). Certain other rights exist by necessary implication. For example, employees may request

information from the Occupational Safety and Health Administration; such requests would constitute the exercise of a right afforded by the Act. Likewise, employees interviewed by agents of the Secretary in the course of inspections or investigations could not subsequently be discriminated against because of their cooperation.

(b)(1) On the other hand, review of the Act and examination of the legislative history discloses that, as a general matter, there is no right afforded by the Act which would entitle employees to walk off the job because of potential unsafe conditions at the workplace. Hazardous conditions which may be violative of the Act will ordinarily be corrected by the employer, once brought to his attention. If corrections are not accomplished, or if there is dispute about the existence of a hazard, the employee will normally have opportunity to request inspection of the workplace pursuant to section 8(f) of the Act, or to seek the assistance of other public agencies which have responsibility in the field of safety and health. Under such circumstances, therefore, an employer would not ordinarily be in violation of section 11(c) by taking action to discipline an employee for refusing to perform normal job activities because of alleged safety or health hazards.

(2) However, occasions might arise when an employee is confronted with a choice between not performing assigned tasks or subjecting himself to serious injury or death arising from a hazardous condition at the workplace. If the employee, with no reasonable alternative, refuses in good faith to expose himself to the dangerous condition, he would be protected against subsequent discrimination. The condition causing the employee's apprehension of death or injury must be of such a nature that a reasonable person, under the circumstances then confronting the employee, would conclude that there is a real danger of death or serious injury and that there is insufficient time, due to the urgency of the situation, to eliminate the danger through resort to regular statutory enforcement channels. In addition, in such circumstances, the employee, where possible, must also have sought from his employer, and been unable to obtain, a correction of the dangerous condition.

(c)(1)[4] which proscribes an employer's discharge of any of its employees for exercising any right afforded under OSHA. The district court found that OSHA provided no legal basis for the Secretary's interpretation of 29 U.S.C. § 660(c)(1) as protecting an employee's refusal to work in the face of hazardous conditions and dismissed the complaint under Federal Rule Civil Procedure 12(b)(6) for failure to state a claim upon which relief could be granted. The Secretary's appeal timely followed. We affirm.

Congress adopted the Occupational Safety and Health Act of 1970 (OSHA) "to assure so far as possible every working man and woman in the Nation safe and healthful working conditions and preserve our human resources" in any business affecting interstate commerce. 29 U.S.C. § 651(b). To this end, the Secretary is authorized to promulgate permanent and, in limited instances, emergency safety and health standards (standards) applicable to the workplace, *id.* § 655; see *Florida Peach Growers Ass'n* v. *United States Department of Labor*, 489 F.2d 120, 123-24 (5th Cir. 1974), and to enforce those standards in appropriate proceedings. *Id.* §§ 657-660(a), (b); see *Atlas Roofing Co.* v. *OSHRC*, 518 F.2d 990, 995-1000

[4] 29 U.S.C. § 660(c)(1) provides:

> No person shall discharge or in any manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to [OSHA] or has testified or is about to testify in any such proceeding or because of the exercise by such employee on behalf of himself or others of any right afforded by [OSHA].

(5th Cir. 1974), *aff'd*, 430 U.S. 442, 97 S.Ct. 1261, 51 L.Ed.2d 464 (1977). Employers and employees are charged with "separate but dependent responsibilities and rights with respect to achieving safe and healthful working conditions . . . ." 29 U.S.C. § 651(b)(2). For example, employers have affirmative duties to furnish their employees with "employment and a place of employment . . . free from recognized hazards . . . causing or are likely to cause death or serious physical harm" and to comply with standards promulgated under the Act. *Id.* § 654(a); see *Ace Sheeting & Repair Co.* v. *OSHRC*, (5th Cir. 1977) 555 F.2d 439. Employees are responsible for complying with the Secretary's standards and "all rules, regulations, and orders issued [under OSHA] which are applicable to [their] own actions and conduct." *Id.* § 654(b). The Act also affords numerous rights to employees, among which are the rights to request inspections of the workplace and to seek mandamus relief against the Secretary when he arbitrarily fails to request injunctive relief to abate dangerous conditions.[5] To ensure that employees will not be intimidated or deterred from exercising their express rights, *id.* § 660(c)(1) provides that employees may file a complaint with the Secretary alleging that their employer has discharged or otherwise discriminated against them for exercising any right afforded under the Act.

[5] *Id.* §§ 657(f)(1), 662(d).

The Secretary has interpreted section 660(c)(1) to protect employees in the exercise of rights that exist by necessary implication as well as those rights that are expressly afforded under OSHA. 29 C.F.R. § 1977.12(a) (1976). As a means of implementing this interpretation, the Secretary has determined that OSHA implicitly affords employees the right to refuse to work "under . . . circumstances then confronting the employee [at the workplace which] would [cause him to] conclude that there is a real danger of death or serious injury and that there is insufficient time, due to the urgency of the situation, to eliminate the danger through resort to regular statutory enforcement channels." *Id.* § 1977.12(b)(2) (1976); see note 3 *supra*. Our task in the instant case is to determine the validity of this regulation.

The district court dismissed the Secretary's complaint under Federal Rule Civil Procedure 12(b)(6). We review this appeal under the "accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley* v. *Gibson*, 355 U.S. 41, 45-46, 78 S.Ct. 99, 102, 2 L.Ed. 2d 80 (1957); *followed, e.g., Robinson* v. *Price*, 553 F.2d 918, 919 (5th Cir. 1977).

The Secretary issued regulation 1977.12(b) pursuant to his grant of authority to "prescribe such rules and regulations as he may deem necessary to carry out [his] responsibilities under [the Act] . . . ." 29

U.S.C. § 657(g)(2). The validity of the Secretary's regulations "will be sustained so long as [they are] 'reasonably related to the purposes of the enabling legislation' . . ." *Mourning* v. *Family Publications Service, Inc.*, 411 U.S. 356, 369, 93 S.Ct. 1652, 1661, 36 L.Ed.2d 318 (1973), *quoting Thorpe* v. *Housing Authority*, 393 U.S. 268, 280-81, 89 S.Ct. 518, 525, 21 L.Ed.2d 474 (1969). Moreover, as the Secretary's interpretation of OSHA's requirements is entitled to "great weight," *Brennan* v. *Southern Contractors Service*, 492 F.2d 498, 501 (5th Cir. 1974), Daniel has the burden of proving that the Secretary's regulation is inconsistent with his congressional grant of authority. *See, e.g., Springdale Convalescent Center* v. *Mathews*, 545 F.2d 943, 951 (5th Cir. 1977). Nonetheless, our examination of the statutory scheme and the legislative history of the Act compels the conclusion that Daniel has satisfied its burden and that the regulation is invalid because it is beyond the Secretary's grant of authority under the enabling provision.

A. The Statutory Rights of Workers When Confronted With Imminent Dangers

29 U.S.C. § 657(f)(1) entitles workers who believe that an "imminent danger" exists at the workplace to notify the Secretary of the danger.[6] If the Secre-

[6] 29 U.S.C. § 652, which sets forth Congress's definitions of principal words and phrases in the Act, does not provide a definition of "imminent danger." Under 29 U.S.C. § 662(a), the Secretary has the authority to enjoin "any conditions or

tary determines an inspection is unnecessary, he must notify the worker of his decision. If the Secretary is satisfied, however, that the notice provides him with reasonable grounds to believe that an imminent danger exists, an OSHA inspector may enter the workplace to inspect and investigate the premises, "all pertinent conditions, structures, machines, apparatus, devices, equipment, and materials . . . and . . . question privately any such employer, owner, operator, agent or operator." *Id.* § 657(a). If, upon inspection and investigation, the OSHA inspector believes that the employer has violated the Act, he must issue the employer a citation, notifying him that the unlawful condition or practice must be abated within a prescribed time. The citation must be prominently posted at or near the place of the violation within six months of the alleged violation in order to apprise employees of the offense. *Id.* § 658.

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practices in any place of employment which are such that a danger exists which could reasonably be expected to cause death or serious physical harm immediately or before the imminence of such danger can be eliminated through the enforcement procedures otherwise provided by [the Act]." The legislative history supports the conclusion that this is to serve as Congress's definition of the phrase "imminent danger." *E.g.*, S.Rep. No. 1282, 91st Cong., 2d Sess. 12, 35 [hereinafter cited as S.Rep.], *reprinted in* Subcommittee on Labor of Senate Committee on Labor and Public Welfare, 92d Cong., 1st Sess. Legislative History of the Occupational Safety and Health Act of 1970, at 152, 175 (Comm. Print 1971) [hereinafter cited as Legislative History], *and reprinted in* [1970] U.S.Code Cong. Admin. News, pp. 5177, 5189, 5212 [hereinafter cited as 1970 U.S.Admin.News].

If the OSHA inspector believes, however, that practices or conditions exist in the workplace which present a danger of death or serious physical harm immediately or before the danger can be eliminated through other enforcement procedures, the OSHA inspector must recommend to the Secretary that immediate injunctive relief against the dangerous practices or conditions be sought. *Id.* § 662(a), (b), (c).[7] The inspector must notify employees at the affected workplace that he believes such conditions exist and that he is requesting injunctive relief. *Id.* § 662(c). Employees are entitled to petition the federal district court for a writ of mandamus against the Secretary if he arbitrarily or capriciously fails to seek the injunctive relief requested by the OSHA inspector. *Id.* § 662(d).

Congress's apparent purpose in granting workers the right to request inspections for imminent dangers is to enable them to be adjuncts to OSHA inspectors who have primary responsibility for conducting

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[7] District courts are authorized to enter injunctive orders that require any necessary relief to

> avoid, correct, or remove such imminent danger and prohibit the employment or presence of any individual in locations or under conditions where such imminent danger exists, except individuals whose presence is necessary to avoid, correct, or remove such imminent danger or to maintain the capacity of a continuous process operation to resume normal operations without a complete cessation of operations, or where a cessation of operations is necessary, to permit such to be accomplished in a safe and orderly manner.

29 U.S.C. § 662(a).

OSHA compliance inspections at the employer's premises. This may also be inferred from the fact that *id.* § 657(c) provides that an authorized employee representative is entitled to accompany the OSHA inspector when conducting a physical inspection of the worksite and that, in the absence of such a representative, the OSHA inspector must consult employees present about safety and health matters for the purpose of aiding the inspection. A worker's exercise of these rights facilitates on-site inspections and thus aids the enforcement efforts of OSHA's inspection forces. It also assures a greater degree of involvement on their part in the investigation process and serves to make them more conscious of safety and health conditions and practices in the workplace.[9]

While Congress envisioned that workers play an integral role in achieving the salutary purpose of assuring safe and healthful working conditions, in relation to preventing imminent dangers, OSHA expressly provides the contours of the part that workers play: (1) They may notify the Secretary of those conditions and practices that they believe present an imminent danger and request an immediate inspection, and (2) they may provide the inspector with information during the investigation. Before an imminent danger is enjoined, however, four independent judgments must be integrated in the decision-making calculus: (1) The Secretary must conclude that the worker's notice provides reasonable grounds to be-

[9] S.Rep. 11 *reprinted in* Legislative History 151 *and reprinted in* 1970 U.S.Admin.News, pp. 5187-88.

lieve that an imminent danger exists. (2) An OSHA inspector must conclude upon inspecting the workplace that the danger cannot be prevented through normal enforcement procedures but requires immediate injunctive relief and recommend to the Secretary that he seek relief. (3) The Secretary must conclude that the inspector is correct and proceed to federal court. (4) A federal district court must find that an imminent danger exists at the worksite such that requires immediate injunctive relief. At no point does the Act permit workers to make a determination that a dangerous condition exists *in fact* and that their employment or their employer's business operations may be halted by their refusal to work. Indeed the Secretary, in promulgating regulation 1977.12(b), has acknowledged this with the following language: "[R]eview of the Act and examination of the legislative history discloses that, as a general matter, there is no right afforded by the Act which would entitle employees to walk off the job because of potential unsafe conditions at the workplace." 29 C.F.R. § 1977.12(b)(1)(1976). We now consider the Secretary's arguments that the existence of this right may be implied from the Act, its legislative history, and analogous case law.

B. *An Implied Right of Workers to Refuse to Work When Confronted With Dangerous Conditions*

Pointing to the Act's legislative history, the Secretary asserts that it reflects that (1) Congress desired to enlist employees as private compliance officers as

a means of policing the millions of worksites covered by the Act; (2) informal employer-employee communications provide the most efficacious means of abating unsafe conditions; (3) since workers are often in the best position to discover and identify hazardous practices and conditions, open communications between employees, their employers, and the Secretary are crucial to implementing the enforcement goals of the Act. We agree with the Secretary that in adopting OSHA, Congress granted employees a new set of important rights and sought that they play a vital role in achieving safe and healthful conditions at the workplace.

Two principal series of events which occurred during Congress's consideration of the Act cause us to conclude that Congress did not intend that OSHA grant workers a right to walk off the job when faced with what they believe to be a dangerous work condition.

Representative Daniels of New Jersey sponsored one of several bills dealing with safe and healthful working conditions that the House of Representatives considered during 1969 and 1970.[9] The Daniels Bill,

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[9] During these 2 years, a total of six occupational safety and health bills were introduced in the House. H.Rs. 843, 3809, 4294, 13373, 91st Cong., 1st Sess. (1969); H.Rs. 16785, 19200, 91st Cong., 2d Sess. (1970), *reprinted in* Legislative History 599, 629, 659, 679, 721, 763. Of these, two received the principal attention of Congress: H.R. 16785 (Daniels Bill), which was supported by organized labor, and H.R. 19200 (Steiger Bill), which was supported mainly by Republicans. *See generally* Gross, *The Occupational Safety & Health Act: Much Ado About Something*, 3 Loy.Chi.L.J. 247, 249-51 (1972).

which was reported to the house by the Committee on Education and Labor, contained a subsection which entitled employees to absent themselves from the job with pay when exposed to substances which had a potentially toxic or harmful effect when found or used at certain levels in the workplace, unless their employer provided appropriate warning labels and protective equipment which allowed them to carry out their work without being harmed.[10] Opponents to the Daniels Bill quickly labeled this subsection as guaranteeing workers the right to "strike with pay," a label which proved to be its epitaph. Two months after the Daniels Bill was reported out of committee, Representative Steiger of Wisconsin, an Education and Labor Committee member who had opposed the Daniels Bill, introduced a substitute bill on the floor of the House which did not contain a "strike with pay" provision. In an effort to make his bill more attractive to House members, Representative Daniels ultimately offered a set of floor amendments to his own committee-approved bill which, among other things, deleted its "strike with pay" provisions and gave employees the right to request that the Secretary immediately inspect the premises. His explanation to the House for the amendment with its proposed substitutions is revealing:

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[10] H.R. 16785, 91st Cong., 2d Sess., § 19(a)(5) (1970), *reprinted in* Legislative History 755-56. The committee's accompanying report provides an explanation for the provisions. H.R. No. 1291, 91st Cong., 2d Sess. 29-30 (1970), *reprinted in* Legislative History 859-60.

> The provisions on employees not losing pay was so generally misunderstood that we have decided to drop it. We have no provision for payment of employees who want to absent themselves from risk of harm; instead, we have this amendment which enables employees subject to a risk of harm to get the Secretary into the situation quickly. Instead of making provisions for employees when their employer is not providing a safe workplace, we have strengthened the enforcement by this amendment provision to try and minimize the amount that employees will be subject to the risk of harm.

116 Cong. Rec. 38377-78 (1970), *reprinted in* Legislative History 1009. The Steiger Bill did not give employees the right to request an immediate inspection of the workplace. In choosing between the two bills, the House ultimately adopted the Steiger Bill.[11] The occupational safety and health bill ultimately adopted by the Senate permitted workers to request that the Secretary inspect the employer's premises when they believed that a condition or practice was present which created an imminent danger.[12] The extent of notoriety which the "strike with pay" provision gained is evidenced by the statement of Senator Williams of New Jersey when introducing to the

[11] 116 Cong.Rec. 38715, (teller vote), 38723-24 (roll call votes), (1970), *reprinted in* Legislative History 1091, 112-15. When the House adopted the Steiger Bill, the "strike with pay" provision had been deleted from the Daniels Bill. 116 Cong.Rec. 38715 (1970), *reprinted in* Legislative History 1091-92.

[12] S. 291, 91st Cong., 2d Sess., § 8(f)(1) (1970), *reprinted in* Legislative History 529, 550.

Senate his occupational safety and health bill [13] after it had been reported out of committee. In apprising his fellow solons that his bill did not contain a "strike with pay" provision, Senator Williams remarked:

> I should also add, despite some widespread contentions to the contrary, that the committee bill does not contain a so-called strike-with-pay provision. Rather than raising a possibility for endless disputes over whether employees were entitled to walk off the job with full pay, it was decided in committee to enhance the prospects of compliance by the employer through such means as giving the employees the right to request a special Labor Department investigation or inspection.

119 Cong. Rec. 37326 (1970), *reprinted in* Legislative History 416. Clearly, the Senate committee intended that workers be given the right to request inspections of the employer's premises in lieu of a provision entitling them to leave the premises with pay. When the Steiger Bill and the Williams Bill were submitted to the conference committee, the House acceded to this provision in the Williams Bill.[14]

[13] S. 2193, 91st Cong., 1st Sess. (1960), *reprinted in* Legislative History 1. An amended version of the Williams Bill was reported out of the Senate Committee on Labor and Public Welfare, S. 2193, 91st Cong., 2d Sess. (1970), *reprinted in* Legislative History 204, with an accompanying committee report. S.Rep. No. 1282, *reprinted in* Legislative History 141 *and reprinted* in 1970 U.S.Admin.News, p. 5177.

[14] H.R. No. 1765, 91st Cong., 2d Sess. 37 (1970), *reprinted in* Legislative History 1190, *and reprinted in* 1970 U.S.Admin. News, p. 5234.

The second principal series of events involves the legislative evolution of the Act's "imminent danger" section, 29 U.S.C. § 662, the provisions of which were discussed above. As originally reported out of committee, the Daniels Bill permitted OSHA inspectors to issue administrative orders which "prohibit[ed] the employment or presence of any individuals on locations or under conditions where . . . an imminent danger exists, except to correct or remove it" but which could not remain in effect for more than five days. A United States district court in an action by the Secretary was given the authority to enjoin business operations for greater lengths of time.[15] The Steiger Bill vested authority only in the courts, upon petition of the Secretary, to enjoin imminent dangers at the workplace.[16] As a response to the Steiger Bill, Representative Daniels amended the imminent danger section of his bill so that only the courts had the authority to enjoin an employer's business operations.[17]

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[15] H.R. 16785, 91st Cong., 2d Sess., § 12(a) (1970), *reprinted in* Legislative History 893, 955-56. The committee's accompanying report provides an explanation for this provision. H.R. No. 1291, 91st Cong., 2d Sess. 25 (1970), *reprinted in* Legislative History 855. Several minority members, however, expressed their dissatisfaction with this provision.

[16] H.R. 19200, 91st Cong., 2d Sess., § 12 (1970), *reprinted in* Legislative History 796-98.

[17] When proposing his amendments to the House, Representative Daniels offered the following explanation for permitting only the United States district courts to enjoin an employer's business:

> While administrative shutdown provisions are contained in the laws of 36 States and the District of Columbia, business groups have expressed great fears about the potential for abuse. They believe that the power to shut down a plant should not be vested in an inspector.
>
> While there is no documentation for this fear, we recognize that it is very prevalent. The Courts have shown their capacity to respond quickly in emergency situations, and we believe that the availability of temporary restraining orders will be sufficient to deal with emergency situations. Under the Federal rules of civil procedure, these orders can be used ex parte. If the Secretary uses the authority that he is given efficiently and expeditiously, he should be able to get a court order within a matter of minutes rather than hours.

Id. 38378, *reprinted in* Legislative History 1009-10.

The Williams Bill contained an imminent danger provision, however, which authorized an OSHA inspector, upon receiving the concurrence of an appropriate regional Labor Department official, to issue an administrative order restraining an employer's business operations for a period up to 72 hours. This authority was to be exercised only when the Secretary had insufficient time to seek and obtain a court-ordered injunction, and the Secretary was required to provide appropriate review procedures to permit employers to obtain immediate reconsideration of an inspector's administrative order.[18] When the Williams

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[18] S. 2193, 91st Cong., 2d Sess., § 12 (1970), *reprinted in* Legislative History 561-64. The Senate committee's accompanying report provides an explanation of this procedure. S.Rep. 12-13, *reprinted in* Legislative History 152-53, *and*

Bill and the Steiger Bill were submitted to conference committee, the Senate receded from its provision permitting OSHA inspectors to issue 72-hour administrative orders.[19]

"Instead of balancing the various generalized axioms of experience in construing legislation, regard for the specific history of the legislative process that culminated in the Act now before us affords more solid ground for giving it appropriate meaning." *United States* v. *Universal C.I.T. Credit Corp.*, 344 U.S. 218, 222, 73 S.Ct. 227, 230, 97 L.Ed. 260 (1952); *see Southern Pacific Transportation Co.* v. *Usery*, 539 F.2d 386, 391 (5th Cir. 1976).

Both chambers of Congress considered specific provisions designed to afford workers certain rights or no rights whatsoever when confronted with conditions or practices presenting an imminent danger of death or physical injury to workers. While the so-called "strike with pay" provision of the Daniels Bill literally applied to conditions dangerous to health rather than conditions dangerous to safety, the wholesale rejection of the provision demonstrates that an overriding concern of Congress was its fear that workers

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reprinted in 1970 U.S.Admin.News, pp. 5189-90. In expressing his views on the Williams Bill, Senator Javits of New York was careful to note the distinction between the imminent danger provision of the Williams Bill and the one contained in the Daniels Bill. *Id.* 56-57, *reprinted in* Legislative History 195-96, *and reprinted in* 1970 U.S.Admin.News, p. 5221.

[19] H.R. No. 1765, 91st Cong., 2d Sess. 40 (1970), *reprinted in* Legislative History 1193, *and reprinted in* 1970 U.S.Admin. News, p. 5236.

might abuse the rights granted and disrupt or terminate their employer's business operations as a form of intimidation or harassment. Apparently believing that workers might also attempt unduly to influence OSHA inspectors if these officials were given the authority to issue administrative orders restraining an employer's business operations, Congress gave the federal courts the sole authority to enjoin, upon the Secretary's petition, an employer's business and then only to the extent necessary to eradicate the imminent danger.

In lieu of providing workers with the right to "strike with pay," the Senate committee approved legislation providing employees with the right to request that the Secretary immediately inspect the employer's premises when they believed that an imminent danger exists at the workplace. In ultimately granting workers this right to request inspections, Congress adopted a procedure that permitted workers to participate in the enforcement efforts under the Act. Yet at the same time in providing a statutory scheme requiring four independent evaluations of the existence *vel non* of the allegedly dangerous condition prior to permitting a court to enjoin an employer's business operations, it created a procedure that would prevent the potential for abuse from the worker's indiscriminate exercise of his right and avoid unnecessary confrontations between employer and employees which might cause a disruption of the employer's business operations.

The Secretary's regulation before the court today is designed to achieve an end consistent with the purposes of the Act. Yet it expressly confers upon employees a right that Congress deliberately chose not to grant to OSHA inspectors: the right to determine *in fact* that an employment practice or condition presents "a real danger of death or physical injury and that there is insufficient time, due to the urgency of the situation, to eliminate the danger through resort to regular statutory procedures." 29 C.F.R. § 1977.12 (b)(2) (1976). Moreover, by permitting employees to refuse work upon making such a determination, the regulation provides them authority equivalent to that of an OSHA inspector when issuing an administrative stop work order—a right which Congress also deliberately withheld from OSHA inspectors.[20] A worker's abuse of the authority afforded under the regulation could disrupt or cripple an employer's business. The legislative history is manifest that Congress feared such a result. We hold that the regula-

[20] Judge Wisdom's dissent would permit the regulation on the theory that Congress meant to allow workers rather than federal employees the right to make safety determinations. He reasons that by impliedly shifting the power to close down a job to an employee rather than "a lone government inspector," due process problems with the latter solution would disappear. While it is conceded the actor would become a private person, the protection Congress afforded to the employer arguably would diminish rather than increase. We respond by reiterating that if Congress was expressly unwilling for an OSHA inspector to decide job safety, then clearly they did not impliedly intend to entrust the shutdown power to a single employee.

tion exceeds the Secretary's scope of authority to promulgate regulations as granted under the Act.

Citing similar anti-employee discrimination provisions in other remedial labor legislation and decisions construing those provisions as protecting a broad penumbra of protected employee activities, the Secretary argues that 29 U.S.C. § 660(c)(1), which protects employees in their exercise of any right afforded by the Act, necessarily encompasses the right of employees to refuse to work in the face of hazardous conditions.

The Secretary's use of these decisions as support for its position here is misplaced. For example, the Secretary relies upon *Phillips* v. *Interior Board of Mine Operations Appeals*, 163 U.S.App.D.C. 104, 500 F.2d 772 (1974), *cert. denied*, 420 U.S. 938, 95 S.Ct. 1149, 43 L.Ed.2d 415 (1975), a case arising under the Coal Mine Safety and Health Act, 30 U.S.C. §§ 801 *et seq.* Section 820(b)(1) of this Act provides in part: "No person shall discharge or in any . . . way discriminate against any miner [for having] . . . notified the [agency] . . . of any alleged violation or danger . . . filed, instituted, or . . . testified . . . in any proceeding . . ." In *Phillips* the United States Court of Appeals for the District of Columbia held that this provision prohibits an employer from discharging an employee who had notified his foreman or authorized safety committee man of possible safety violations in the employer's mine. The court found that the employee's activity was protected because it constituted the initial step in an internal review pro-

cedure agreed upon by the employer and the employee's representative for processing employee safety complaints under the Coal Mine and Safety Act. 163 U.S.App.D.C. at 111-113, 500 F.2d at 779-81. *See also Munsey* v. *Morton*, 165 U.S.App.D.C. 379, 507 F.2d 1202, 1209 (1974) (vacating and remanding decision of the Interior Board of Mine Operations Appeals order to determine whether *Phillips* applied).

The complaint in the instant case, however, contains no allegations that Daniel and its employees have established an internal procedure for the processing and review of employees' safety complaints or that Simpson attempted to make or made a complaint under an established review procedure and was discharged for doing so. The complaint alleges solely that Simpson was discharged for refusing to work in the face of hazardous conditions. This is not an employee activity protected under OSHA.

The Secretary also relies upon *NLRB* v. *Scrivener*, 405 U.S. 117, 92 S.Ct. 798, 31 L.Ed.2d 79 (1972). In *Scrivener* an employer had discharged several of its employees for giving written sworn statement to a NLRB field examiner who was investigating an unfair labor practice charge filed against the employer. 29 U.S.C. § 157(a)(4) of the National Labor Relations Act (NLRA) provides that an employer commits an unfair labor practice when he discharges or otherwise discriminates against an employee for filing charges or giving testimony under the NLRA. The United States Supreme Court interpreted this section as prohibiting the employer's discharge of his em-

ployees for their activity because such a construction comported with the sections' objective of providing the Board with sources of employee information essential to enforcing the NLRA. *Id.* at 122, 92 S.Ct. 801.

OSHA expressly permits employees to request that the Secretary make inspections when an imminent danger arises and to provide the OSHA inspector with information about the danger when the workplace is being investigated. The complaint contains no allegations that can be construed as encompassing this protected activity. For example, the complaint does not allege that Simpson was fired for temporarily absenting himself from his job so that he might request an OSHA inspection and give notice of the dangerous condition. Nor does it allege that Simpson was fired for attempting to make such a request.

When adopting OSHA, Congress deliberately sought to achieve job safety while maintaining proper employer-employee relations. Recognition of an employee's right to refuse to work in the face of hazardous conditions does not necessarily further the same informational purposes that the right to request inspections promotes. As we have already noted, the abuse of this right could disrupt or permanently damage an employer's business operation—a hazard that Congress refused to place within the ambit of the Act.[21]

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[21] The dissent dramatically refuses to attribute to Congress an intent to place workers in the dilemma of losing job or life. We do not find that Congress ever perceived it faced making such a choice. They did answer the question of whether the

Here we are provided with "substantial countervailing considerations" which militate against the recognition of the right at issue, a factor the Supreme Court found wanting in *Scrivener*. Id. at 125, 92 S.Ct. 8[illegible]. The decision of the district court is

AFFIRMED.

WISDOM, Circuit Judge, dissenting:

The Court today finds that the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651 *et seq.*, requires a worker to choose between his job and risk of death. An interpretative regulation of the Secretary of Labor, 29 C.F.R. 1977.12(b), eliminates this hard choice. In my opinion, the regulation invalidated by the Court is reasonably related to the purposes of the Act. Because I cannot read the legislative history to forbid implicitly this regulation, I must respectfully dissent.

I.

The district court dismissed the complaint for failure to state a claim upon which relief could be granted. "In appraising the sufficiency of the complaint, we follow, of course, the accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which

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employer or a government official would decide the work place was free of imminent danger by choosing to leave this judgment with the employer. The beneficent intent of the regulation is conceded. Its lack of foundation in the legislation it must implement is its undoing.

would entitle him to relief." *Conley* v. *Gibson*, 1957, 355 U.S. 41, 45, 78 S.Ct. 99, 102, 2 L.Ed.2d 80. "This rule, which has been stated hundreds of times, precludes final dismissal for insufficiency of the complaint except in the extraordinary case where the pleader makes allegations that show on the face of the complaint some insuperable bar to relief." Wright, Federal Courts, ch. 10, § 68, p. 322 (1976). This case presents in pure form, therefore, a challenge to the Secretary of Labor's interpretative regulation, 29 C.F.R. 1977.12(b), on which the plaintiff relies.[1]

For the purpose of the motion to dismiss, we assume that the plainitff would be able to prove the following set of facts which are within the ambit of the facts alleged in the complaint. Daniel Construction Company employed Jimmy Simpson as an ironworker connecting structural steel in the construction of tall buildings. The job required fitting into place heavy steel beams with the aid of a crane. One windy day Simpson was working 150 feet above the ground. The wind grew so strong that it imperiled his life. He came down from high on the steel skeleton where he had been working. So did

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[1] Three district courts, other than the court below, have passed on the validity of this regulation. *Usery* v. *Babcock & Wilcox*, E.D.Mich. 1976, 424 F.Supp. 753 (regulation upheld); *Usery* v. *Whirlpool Corporation*, N.D.Ohio, 1976, 416 F.Supp. 30, *appeals docketed*, Nos. 76-2143, 76-2144, 6 Cir., Sept. 7, 1976 (regulation held invalid); *Brennan* v. *Diamond Int'l Corp., Heekin Can Div.*, S.D.Ohio, June 8, 1976, C.A. No. C-1-75-43, *appeal dismissed*, No. 76-2139, 6 Cir., April 1977 (regulation held invalid.

the rest of his crew. A foreman ordered the crew to return to work. Simpson refused. He was fired.

The importance of the majority's holding extends far beyond this case. The effect of the holding is to force an anti-social dilemmna on workers who face imminent danger of a hazard then and there occurring and have no immediate relief available but to refuse to continue working in an unsafe place. The procedures which the statute expressly provided to correct unsafe conditions cannot come to the worker's rescue in time when he is exposed to immediate danger to life or limb.

The regulation in question provides:

> "(2) However, occasions might arise when an employee is confronted with a choice between not performing assigned tasks or subjecting himself to serious injury or death arising from a hazardous condition at the workplace. If the employee, with no reasonable alternative, refuses in good faith to expose himself to the dangerous condition, he would be protected against subsequent discrimination. The condition causing the employee's apprehension of death or injury must be of such a nature that a reasonable person, under the circumstances then confronting the employee, would conclude that there is a real danger of death or serious injury and that there is insufficient time, due to the urgency of the situation, to eliminate the danger through resort to regular statutory enforcement channels. In addition, in such circumstances, the employee, where possible, must also have sought from his employer, and

> been unable to obtain, a correction of the dangerous condition." [2]

The majority recognizes a properly deferential standard for our review of the Secretary's interpretation of the Act. However, it does not seem to apply the spirit of the Supreme Court's injunction that to sustain such an interpretation, "we need not find that [his] construction is the only reasonable one, or even that it is the result we would have reached had the question arisen in the first instance in judicial proceedings". *Udall* v. *Tallman*, 1965 380 U.S. 1, 16, 85 S.Ct. 792, 801, 13 L.Ed.2d 616, 625, *quoting Unemployment Comm'n* v. *Aragan*, 1946, 329 U.S. 143, 153, 67 S.Ct. 245, 250, 91 L.Ed. 136, 145. *See Brennan* v. *Southern Contractors Service*, 5 Cir. 1974, 492 F.2d 498, 501.

II.

This regulation is reasonably related to the purposes of the Act. The Act begins with this statement of purpose.

> "The Congress declares it to be its purpose and policy . . . to assure so far as possible every working man and woman in the Nation safe and healthful working conditions and to preserve our human resources." [3]

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[2] 29 C.F.R. § 1977.12(b) (1976). This regulation was adopted as an interpretation of the Act. *See* 29 C.F.R. § 1977.2 (1976).

[3] 29 U.S.C. § 651(b) (1970).

Section 11(c)(1) of the Act, 29 U.S.C. § 660(c)(1), provides the specific foundation for these regulations:

> "No person shall discharge or in any manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this Act or has testified or is about to testify in any such proceeding or because of the exercise by such employee on behalf of himself or others of any right afforded by this Act."

Following his mandate to protect the American worker, the Secretary has filled a dangerous gap in the Act. As the majority points out, the Act allows a worker to make a written request for immediate federal inspection whenever the worker believes himself to be in imminent danger. The Secretary must determine whether such an inspection is warranted. If he finds it is not, he must notify the complaining parties in writing. If he finds that it is, he must order an investigation as soon as practicable. The inspector then must determine whether imminent danger exists. If he finds that it does, he is required to inform the Secretary, who may bring an action in federal district court for an injunction. The employee may use a writ of mandamus, or its equivalent,[4] to force the Secretary to act properly. While

[4] The Act provides specifically for a writ of mandamus, 29 U.S.C. § 662(d) (1970). The writ of mandamus, however, has been abolished in federal practice. F.R.Civ.P. 81(b). *See* Oldham, O.S.H.A. May Not Work in 'Imminent Danger' Cases, 60 A.B.A.J. 690 (1974).

these events take place, the worker, presumably in imminent danger, has no relief according to the majority. In this case Jimmy Simpson would be required to stay on the high skeleton, handling heavy steel and attempting to balance himself, no matter how strong the winds became, or lose his job—until the district court issued an injunction. A literal reading of the statute in this situation may make its remedies tragically late.

Regulation 1977.12(b) was promulgated to fill this gap. If the employee reasonably believes that he is in iminent danger of death or serious bodily harm *and* believes the procedures outlined above inadequate to prevent that danger, he may withdraw from work without penalty. This gives the employee an essential interim protection while the statutory remedies are being followed. This protection is limited. The government cannot order the employer to make any changes, and, apparently, the worker is neither entitled to receive pay while not working, nor privileged to refuse alternative, safe work. He merely wins freedom from exposure to danger.

There are two different ways to justify this interpretation of section 11(c)(1). First, the regulation can be interpreted as embodying one of the "other rights" mentioned in 11(c)(1), a right to safe conditions implicit in the entire law.

Second, the regulation can be seen as an essential part of the employee enforcement envisioned by Con-

gress and protected by that section.[5] It both increases the incentive for the worker to use the Act's protective mechanism and it ensures that the reporting worker will be available during the inspection and any later proceedings. Similar provisions are contained in other labor legislation, including the National Labor Relations Act,[6] the Coal Mine Safety and Health Act,[7] and Title VII of the Civil Rights

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[5] Congress, aware of the shortage of federal and state occupational safety inspectors, placed great reliance on employee assistance in the enforcement of the Act. *See* S.Rep. No. 1282, 91st Cong., 2d Sess. 11-12, *reprinted in* Subcommittee on Labor of Senate Committee on Labor and Public Welfare, 92d Cong., 1st Sess., Legislative History of the Occupational Safety and Health Act of 1970, at 151-52 (Comm. Print 1971) [cited below as Legislative History], *and reprinted in* [1970] U.S. Code Cong. & Admin.News pp. 5177, 5188-89 [cited below as 1970 U.S.Admin.News]; H.Rep. No. 1291, 91st Cong., 2d Sess. 22, *reprinted in* Legislative History at 852; 116 Cong.Rec. 38386 (remarks of Rep. Dent), *reprinted in* Legislative History at 1034. *See also* Cohen, The Occupational Safety and Health Act: A Labor Lawyer's Overview, 33 Ohio St. L.J. 788, 799-802. *Cf. Phillips* v. *Interior Board of Mine Operations Appeals*, 1974, 163 U.S.App.D.C. 104, 110-114, 500 F.2d 772, 778-82 (Congressional intent in Coal Mine Safety and Health Act).

[6] "It shall be an unfair labor practice for an employer . . . to discharge or otherwise discriminate against an employee because he has filed charges or otherwise given testimony under this Act." § 8(a)(4), National Labor Relations Act, 29 U.S.C. § 158(a)(4) (1970).

[7] "No person shall discharge or in any . . . way discriminate . . . against any miner [because he] . . . notified the [agency] . . . of any alleged violation or danger, . . . filed, instituted or . . . testified . . . in any proceeding . . . ." 30 U.S.C. § 820(b)(1) (1970).

Act of 1964.[8] Courts have given these provisions broad constructions, furthering the purposes of the Acts by making employee enforcement easier. In *Scrivener* v. *NLRB*, 1972, 405 U.S. 117, 92 S.Ct. 798, 31 L.Ed.2d 79, the Supreme Court upheld a construction of the NLRA provision that workers who made written statements to the board's examiners were protected by a statute that spoke only of "testimony". In *Phillips* v. *Interior Board of Mine Operations Appeals*, 1974, 163 U.S.App. D.C. 104, 500 F.2d 772, the Court, in the context of that particular working arrangement, read similar language to protect a miner who refused to work for safety reasons. The Court considered the refusal to work a complaint which, under the procedures at that mine, started in motion the administrative process. 163 U.S.App.D.C. at 110-113, 500 F.2d at 778-81. In *EEOC* v. *Kallir, Philips, Ross, Inc.*, 1975, S.Y. N.Y., 401 F.Supp. 66, an employee had been fired for seeking information about her complaint from some of her employer's customers. The court held that she was protected in that endeavor by the Act. The majority properly points out that these precedents are not controlling. They do, however, furnish

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[8] "It shall be an unlawful employment practice for an employer to discriminate against any of his employees . . . because he has opposed any practice made an unlawful employment practice by this title, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding or hearing under this Title." § 704(a), Title VII, Civil Rights Act of 1964, 42 U.S.C. § 2000e-3(a) (1970).

examples of broad judicial construction of provisions similar to the Secretary's regulation.[9]

III.

The Court does not dispute the rationality of the regulation. Instead, it rests its conclusion on its reading of the legislative history. The exclusion of two provisions by Congress—the so-called "strike with pay" provision, and the original imminent danger provision—convinces the majority that Congress did not intend that workers have the right embodied in regulation 1977.12(b). No clause in the Act leads to the conclusion that the statutory system is the exclusive remedy. Instead, the Court implies not merely a congressional unwillingness to directly grant these rights, but a congressional prohibition on this use of the Secretary of Labor's power. My reading of the legislative history convinces me that the majority is wrong.

The strike with pay provision was present in the Daniels Bill, reported by the House Committee on Education and Labor and supported strongly by organized labor. The provision was located in the section dealing with federal research on toxicity. It provided that employers or employees could request an HEW determination of the toxicity of any materials in their workplace. Within sixty days of that

[9] None of the three Acts considered above contains language similar to the "any other right afforded by this Act" phrase in § 11(c)(1).

determination, the employer could not require that an employee be exposed to greater than toxic concentrations unless the employee were informed of the hazards, the symptoms associated with the substance, and proper precautions for dealing with it. Furthermore, the employer had to furnish the employee with proper personal protective equipment. If those conditions were not met, an employee could be subjected to the toxic substance only if he could "absent himself from such risk of harm for the period necessary to avoid danger without loss of regular compensation for such period".[10]

The rejection of that proposal has little bearing on this regulation. It was written to deal with problems of increasing concentrations of toxic substances, not immediate hazards. It spoke only of toxicity dangers, it did not require an imminent threat to life, and it was a remedy to be invoked only after 60 days without employer action. Unlike that provision, the regulation in question does not provide for an absence with pay.

The bills reported out of both House and Senate Committees originally contained provisions for administratively ordered shutdowns in cases of imminent danger. The bill as passed by the Senate provided:

> "If the Secretary determines that the imminence of a danger is such that immediate action is

[10] H.R. 16785, 91st Cong., 2d Sess. § 19(a)(5) (1970) *reprinted in* Legislative History 755-56.

necessary, and the Secretary determines that there is not sufficient time, in light of the nature and immience of the danger, to seek and obtain a temporary restraining order . . . the Secretary shall issue an order *requiring such steps to be taken as may be necessary to avoid, correct, or remove such imminent danger and prohibiting the employment or presence of any individual in locations or under conditions where such imminent danger exists.* . . . Such order may remain in effect for not more than seventy-two hours from the time of its issuance. If the Secretary delegates his authority to issue such an order to close a business or plant, in whole or in substantial part, he shall provide that such an order may not be issued until the employer has been notified in writing, signed by the delegate of the Secretary, setting forth specially the nature and imminence of the danger compelling immediate action and the concurrence of an official of the Labor Department appointed by the President with the advice and consent of the Senate is first obtained." [Emphasis added.][11]

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[11] S. 2193, 91st Cong., 2d Sess., § 12(b) (as passed by the Senate), *reprinted in* Legislative History at 562-63.

The Williams Act as originally proposed, S. 2193, 91st Cong., 1st Sess., § 6(a)(2) (1969), *reprinted in* Legislative History at 1, 12-13, allowed the Secretary to make such an order in imminent danger situations. The order would have prohibited all employment at the site except for the purpose of eliminating the hazard, and would have remained in effect indefinitely pending the outcome of administrative proceedings. As S. 2193 emerged from the Committee, it limited the duration of the order to 72 hours and required that a regional director of the Labor Department concur in the inspector's order. S. 2193, 91st Cong., 2d Sess., § 11(b) (1970), *reprinted in* Legislative History at 263-64. The Senate adopted amendments to that section which required that the Labor Department official authorizing the inspector's actions be one appointed with the advice and consent of the Senate, and requiring that the employer be notified of the reasons for the shutdown. 116 Cong. Rec. 37624-25 (1970), *reprinted in* Legislative History at 508-09; 116 Cong.Rec. 37621-22 (1970), *reprinted in* Legislative History at 499-500. The Senate considered and narrowly rejected an amendment which would have eliminated the administrative power to order operations stopped. 116 Cong.Rec. 37601-05 (1970) (roll call vote, and debate) *reprinted in* Legislative History at 451-61.

In the House of Representatives, the Daniels Bill, H.R. 16785, 91st Cong., 2d Sess., § 12(a), authorized the Secretary to issue a shut-down order of 5 day duration. *Reprinted in* Legislative History at 742. That provision was reported out of Committee in the same form. H.Rep. 1291, 91st Cong., 2d Sess., 41 (1970), *reprinted in* Legislative History at 871. The Steiger-Sikes substitute bill, H.R. 19200, eliminated the administrative closure order entirely, in favor of district court injunctions. H.R. 19200, 91st Cong., 2d Sess., § 12 (1970), *reprinted in* Legislative History at 763, 796-98. Representative Daniels offered to amend his bill to conform to the substitute in this respect, 116 Cong.Rec. 38372, 38378 (1970), *reprinted in* Legislative History 993, 1009-10. However, the Steiger-Sikes bill was adopted as a substitute to the Daniels bill by amendment, and then adopted. 116 Cong.Rec. 38723-33 (1970) (roll call votes on the amendment, adoption of bill), *reprinted in* Legislative History 1112-18.

This provision differed significantly from the regulation promulgated by the Secretary of Labor. First, it empowered an official to order the entire operation closed. Second, in some versions it allowed the official to order remedies on the spot. Third, and most importantly, it relied upon action by the government. In contrast, the regulation provides only that those

workers endangered may refuse to work. It does not allow them to order the employer to make changes. And it relies on purely private actions, not those of the federal government.

A study of the legislative history shows that the last difference is crucial. Opponents of the administrative shut-down order in both houses raised two major objections.

It was feared that this provision was unconstitutional.[12] Opponents contended that giving a lone government inspector the power to close down an entire facility, without any judicial action, would deprive the employers of due process of law. This argument applies only to actions taken by the government. Private employees may refuse to work without violating due proces.

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[12] *See* H.R. 1291, 91st Cong., 2d Sess., 56 (1970), *reprinted in* Legislative History at 831, 886 (minority report); 116 Cong.Rec. 37338 (1970), *reprinted in* Legislative History at 425 (Sen. Dominick); 116 Cong.Rec. 37602 (1970), *reprinted in* Legislative History at 453 (Sen. Schweiker); 116 Con.Rec. 37604 (1970), *reprinted in* Legislative History at 458 (Sen. Schweiker); 116 Cong.Rec. 38372 (1970), *reprinted in* Legislative History at 992 (Rep. Steiger); 116 Cong.Rec. 38379 (1970), *reprinted in* Legislative History at 1011-12 (Rep. Randall); 116 Cong.Rec. 38393 (1970), *reprinted in* Legislative History at 1050 (Rep. Michel); 116 Cong.Rec. 38713 (1970), *reprinted in* Legislative History at 1087 (Rep. Robison); 116 Cong.Rec. 42202 (1970), *reprinted in* Legislative History at 1205 (Rep. Quie). *Cf.* Note, Due Process and Employee Safety: Conflict in OSHA Enforcement Procedures, 84 Yale L.J. 1380 (1975) (general discussion of due process problems in the Act).

The other reason advanced in opposition to this provision was that it would break the federal government's neutral role in labor-management relations.[13] Congresmen repeatedly voiced fears that inspectors would become federal pawns in battles between labor and management. But this provision could have prompted these fears only because it involved the power of the federal government. That workers might walk off the job could not have caused these fears by itself, because they already possessed a very similar right. Section 502 of the Taft-Hartley Act, 29 U.S.C. § 143, provides:

> "[T]e quitting of labor by an employee or employees in good faith because of abnormally dangerous conditions for work at the place of employment of such employee or employees [shall not] be deemed a strike under this chapter."

Safety strikes may be concerted activity, protected by § 7 of the National Labor Relations Act, 29 U.S.C. § 157. In such a case, the striking workers cannot be discharged. *See N.L.R.B.* v. *Washington Aluminum Co.*, 1962, 370 U.S. 9, 82 S.Ct. 1099, 8 L.Ed. 2d 298. Section 502 is significant because it carves an exception in no-strike clauses. Thus, despite the generally present express or implied no-strike clauses

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[13] *See* H.R. 1291, 91st Cong., 2d Sess. 55-57 (1970), *reprinted in* Legislative History at 831, 885-887 (minority report); 116 Cong. Rec. 37346 (1970), *reprinted in* Legislative History at 448 ("breakdown of existing Government neutrality in labor-management relations", Sen. Tower); 116 Cong. Rec. 38393 (1970), *reprinted in* Legislative History at 1050 (Rep. Michel).

in collective bargaining agreements, a covered worker may still strike over safety matters. *See N.L.R.B.* v. *Knight Morley Corp.*, 6 Cir. 1957, 251 F.2d 753, *cert. denied*, 357 U.S. 927, 78 S.Ct. 1372, 2 L.Ed.2d 1370; *cf. Gateway Coal Co.* v. *U.M.W.*, 1974, 414 U.S. 368, 94 S.Ct. 629, 38 L.Ed.2d 583 (adopting objective test of "abnormally dangerous conditions"); *Banyard* v. *N.L.R.B.*, 1974, 164 U.S.App.D.C. 235, 241, 505 F.2d 342, 348 (applying *Gateway*).[14] Thus, the idea that workers could refuse to work in hazardous conditions was not unusual. Indeed, Section 502 was mentioned in the debate on this Act in the House of Representatives.[15] What was unusual was placing

[14] In *Gateway Coal*, the Court held that a particular safety dispute was encompassed in the implied no-strike clause of a collective bargaining agreement. However, the Court did not deny that § 502 would override such a no-strike clause. Instead, it held that for that section to be effective, the union would have to "present 'ascertainable, objective evidence supporting its conclusion that an abnormally dangerous condition for work exists.'" 414 U.S. 368, 386-87, 94 S.Ct. 629, 640-41, 38 L.Ed.2d 583, 596-97 (quoting the dissent in the Court of Appeals). In so doing it rejected the subjective interpretation given that phrase by the Third Circuit below. 3 Cir. 1972, 466 F.2d 1157, 1160. While the result in *Gateway Coal* has been criticized as restricting employee rights more than the Act intends, *see* Atleson, Threats to Health and Safety: Employee Self-Help Under the NLRA, 59 Minn.L.Rev. 647 (1975). Courts have continued to find some strikes immune from no-strike clauses because of § 502. *See, e.g., Banyard* v. *N.L.R.B.*, 1974, 164 U.S.App.D.C. 235, 505 F.2d 342, *Plain Dealer Publishing Co.* v. *Cleveland Typo. Union* #53, 6 Cir. 1975, 520 F.2d 1220, 1229 (district court opinion attached as appendix); *United States Steel Corp.* v. *U.M.W.*, W.D.Pa. 1974, 381 F. Supp. 990, 990-91.

[15] 116 Cong.Rec. 42208 (1970), *reprinted in* Legislative History at 1223-24 (Rep. Scherle).

the power to close down an entire plant, with all its employees, in the hands of a lowly and perhaps vulnerable federal inspector. The potential for misuse of federal power disturbed Congress. Regulation 1977.12(b) poses no such threat. It is a right granted the employees, similar to but not exactly coextensive with the right granted by Section 502.[16] By limiting the inspectors' powers, Congress did not require us to reject this lifesaving regulation.

IV.

The Congress that pased this Act did not intend to put the worker to the choice—his job or his life. As one of the co-sponsors of the legislation said:

[16] § 502 only provides that no-strike clauses do not affect safety strikes, protected by § 7 of the National Labor Relations Act, 29 U.S.C. § 157 (1970). Thus, to be protected a strike must be "concerted activity." *See N.L.R.B.* v. *Washington Aluminum Co.*, 1962, 370 U.S. 9, 82 S.Ct. 1099, 8 L.Ed.2d 298. Regulation 1977.12 protects any employee or employees, without requiring concerted activity. Furthermore, § 502 applies only to good faith quitting of labor because of abnormally dangerous conditions. As construed by the Supreme Court, this requires both good faith and objective, ascertainable support for the position that the conditions are in fact abnormally dangerous. *See* n. 14. The regulation requires only a reasonable belief that the employee is threatened with imminent danger of severe bodily harm or death *and* that the Act's provisions could not cure the danger in time. Thus, § 502 lacks an imminence requirement and does not require the threat to be of death or severe bodily harm. Neither does it require that other means be too slow to protect the employee. Regulation 1977.12(b) does not require that the imminent danger be "abnormal", nor does it incorporate a good faith requirement exclusive of "reasonableness".

> "We are talking about people's lives, not the indifference of some cost accountants. We are talking about assuring the men and women who work in our plants and factories that they will go home after a day's work with their bodies intact. We are talking about assuring our American workers who work with deadly chemicals that when they have accumulated a few years seniority they will not have accumulated lung congestion and poisons in their bodies, or something that will strike them down before they reach retirement age." [17]

We are talking about whether Jimmy Simpson had to lose his job to avoid return to a dangerous workplace high on a windswept skeleton of steel. Congress felt that workers could live with the prescribed processes of this Act. I cannot believe that it required workers to die for them. I respectfully dissent.

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[17] 116 Cong.Rec. 37625 (1970), *reprinted in* Legislative History at 510 (Sen. Yarborough).

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 76-1465

D.C. Docket No. CA 75-26 N

JOHN T. DUNLOP, Secretary of Labor, United States Department of Labor, PLAINTIFF-APPELLANT

versus

DANIEL CONSTRUCTION COMPANY, INC.,
DEFENDANT-APPELLEE

Appeal from the United Sates District Court for the Northern District of Georgia

Before WISDOM, CLARK and RONEY, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Georgia, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered that plaintiff-appellant pay to defendant-appellee, the costs on appeal to be taxed by the Clerk of this Court.

November 21, 1977

WISDOM, Circuit Judge, dissenting.

ISSUED AS MANDATE: JAN. 9, 1978

APPENDIX C

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

Office of the Clerk

December 30, 1977

TO ALL PARTIES LISTED BELOW:

No. 76-1465—F. Ray Marshall, Etc. v.
Daniel Construction Co., Inc.

Dear Counsel:

This is to advise that an order has this day been entered denying the petition() for rehearing,** and no member of the panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the petition() for rehearing en banc has also been denied.

See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours,

EDWARD W. WADSWORTH
Clerk

By /s/ Brenda M. Hauck
Deputy Clerk

** on behalf of appellant, Marshall,

cc: Messrs. Michael H. Levin
Dennis K. Kade

Messrs. Robert M. Weinberg
George H. Cohen

Mr. Robert T. Thompson

Mr. Gary S. Klein

APPENDIX D

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
NEWNAN DIVISION

Civil Action No. C-75-26-N

JOHN T. DUNLOP, Secretary of Labor

versus

DANIEL CONSTRUCTION CO., INC.

ORDER

This is an action by the Secretary of Labor to enjoin an alleged violation of 29 U.S.C. § 660(c)(1). Presently pending is the defendant's motion to dismiss for failure to state a claim.

The Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651 *et seq.* is designed to promote minimum safety standards for employers. Section 11(c)(1) prohibits the discharge of any employee

> who has filed any complaint or instituted or caused to be instituted any proceeding under or related to this chapter or has testified or is about to testify in any such proceeding or because of the exercise by such employee on behalf of himself or others of any right afforded by this chapter.

29 U.S.C. § 660(c)(1). The employee in this case was allegedly terminated for his refusal to work

under conditions he considered hazardous. The defendant rightly contends that the Act does not grant the right to refuse to work under circumstances which may constitute an immediate threat of injury or death. The question remains, however, whether such a right will be implied.

The purpose of the Act was to establish uniform national policy and "to assure so far as possible every working man and woman in the Nation safe and healthful working conditions." 29 U.S.C. § 651. See 3 U.S. Code Cong. & Admin. News, p. 5177 (1970). When an employee believes that an immediate danger exists at his workplace the Act provides for a notification to the Secretary in writing requesting an immediate inspection of the location. 29 U.S.C. § 657(f)(1). The Secretary may then order an immediate inspection if he believes reasonable grounds for apprehension appear or he may reject the request and notify the employee in writing of his decision. To deny an employee to temporarily refrain from working under such potentially dangerous conditions, the plaintiff contends, would lead to an absurd result contrary to the expressed legislative intent.

Regulations promulgated by the Secretary state that "as a general matter, there is no right afforded by the Act which would entitle employees to walk off the job because of potential unsafe conditions at the workplace." 29 C.F.R. § 1977.12(b)(1).

> However, occasions might arise when an employee is confronted with a choice between not

> performing assigned tasks or subjecting himself to serious injury or death arising from a hazardous condition at the workplace. If the employee, with no reasonable alternative, refuses in good faith to expose himself to the dangerous condition, he would be protected against subsequent discrimination. The condition causing the employee's apprehension must be of such a nature that a reasonable man, under the circumstances then confronting the employee, would conclude that there is a real danger of death or serious injury and that there is sufficient time, due to the urgency of the situation, to eliminate the danger through resort to regular statutory enforcement channels. In addition, in such circumstances, the employee, where possible, must also have sought from his employer, and been unable to obtain, a correction of the dangerous condition.

29 C.F.R. § 1977.12(b)(2).

It is settled that a strict, literal construction of a statute is not required if it would lead to a ridiculous consequence, see *N.L.R.B.* v. *Wheeling Elect. Co.*, 444 F.2d 783 (4th Cir. 1971); *United States* v. *Ivey*, 294 F.2d 783 (5th Cir. 1961), or frustrate the clear intention of the legislature. See *Missouri Pac. R.R.* v. *Austin*, 292 F.2d 415 (5th Cir. 1961). Rather, the court should look to the reasoning of Congress in addressing a problem and its desire to formulate a national policy. See *Argosy Ltd.* v. *Hennigan*, 404 F.2d 14 (5th Cir. 1968); *Miller* v. *Amusement Enterprises, Inc.*, 394 F.2d 342 (5th Cir. 1968).

Congress, in enacting the Occupational Safety and Health Act of 1970, clearly sought to eliminate the

dangers accompanying unsafe working conditions. The statute should be broadly construed to effectuate that purpose. See, *e.g.*, *Ryder Truck Lines, Inc.* v. *Brennan*, 497 F.2d 230 (5th Cir. 1974); *Southern Contractors Serv.* v. *Brennan*, 492 F.2d 498 (5th Cir. 1974). Nothwithstanding these guidelines, however, the conclusion is inescapable that no claim for relief has been stated here.

The statute clearly provides a method for dealing with the threat of imminent danger through notification to the Secretary of the condition with a request for an immediate inspection. 29 U.S.C. § 657(f)(1). It cannot be determined whether the employee in this case followed this procedure. It is clear, however, that he did refuse to work and the statue affords him no protection for his decision. This is not a simple instance of *casus omissus*. Congress faced the situation such as presented in this suit and it supplied a specific remedy, however inadequate it might be viewed by some.

Nor can a remedy be judicially fashioned so as to bring the complaint within the scope of the Act. A court does not have the power or authority to expand or rewrite legislation pasesd by Congress.

Accordingly, the motion to dismiss is granted.

So ordered this the 5 day of December, 1975.

/s/ Arthur J. Henderson, Jr.
Judge
United States District Court for the
Northern District of Georgia

APPENDIX E

Pertinent regulations of the Department of Labor implementing the Occupational Safety and Health Act of 1970

(Codified at 29 C.F.R. 1971.1-1971.12)

GENERAL

§ 1977.1 Introductory statement.

(a) The Occupational Safety and Health Act of 1970 (29 U.S.C. 651, et seq.), hereinafter referred to as the Act, is a Federal statute of general application designed to regulate employment conditions relating to occupational safety and health and to achieve safer and healthier workplaces throughout the Nation. By terms of the Act, every person engaged in a business affecting commerce who has employees is required to furnish each of his employees employment and a place of employment free from recognized hazards that are causing or likely to cause death or serious physical harm, and, further, to comply with occupational safety and health standards promulgated under the Act. See Part 1975 of this chapter concerning coverage of the Act.

(b) The Act provides, among other things, for the adoption of occupational safety and health standards, research and development activities, inspections and investigations of workplaces, and recordkeeping requirements. Enforcement procedures initiated by the Department of Labor, review proceedings before an

independent quasi-judicial agency (the Occupational Safety and Health Review Commission), and express judicial review are provided by the Act. In addition, States which desire to assume responsibility for development and enforcement of standards which are at least as effective as the Federal standards published in this chapter may submit plans for such development and enforcement of the Secretary of Labor.

(c) Employees and representatives of employees are afforded a wide range of substantive and procedural rights under the Act. Moreover, effective implementation of the Act and achievement of its goals depend in large part upon the active but orderly participation of employees, individually and through their representatives, at every level of safety and health activity.

(d) This part deals essentially with the rights of employees afforded under section 11(c) of the Act. Section 11(c) of the Act prohibits reprisals, in any form, against employees who exercise rights under the Act.

§ 1977.2 Purpose of this part.

The purpose of this part is to make available in one place interpretations of the various provisions of section 11(c) of the Act which will guide the Secretary of Labor in the performance of his duties thereunder unless and until otherwise directed by authoritative decisions of the courts, or concluding, upon reexamination of an interpretation, that it is incorrect.

§ 1977.3 General requirements of section 11(c) of the Act.

Section 11(c) provides in general that no person shall discharge or in any manner discriminate against any employee because the employee has: (a) Filed any complaint under or related to the Act; (b) Instituted or caused to be instituted any proceeding under or related to the Act; (c) Testified or is about to testify in any proceeding under the Act or related to the Act; or (d) Exercised on his own behalf or on behalf of others any right afforded by the Act. Any employee who believes that he has been discriminated against in violation of section 11(c) of the Act may, within 30 days after such violation occurs, lodge a complaint with the Secretary of Labor alleging such violation. The Secretary shall then cause appropriate investigation to be made. If, as a result of such investigation, the Secretary determines that the provisions of section 11(c) have been violated civil action may be instituted in any appropriate United States district court, to restrain violations of section 11(c)(1) and to obtain other appropriate relief, including rehiring or reinstatement of the employee to his former position with back pay. Section 11(c) further provides for notification of complainants by the Secretary of determinations made pursuant to their complaints.

§ 1977.4 Persons prohibited from discriminating.

Section 11(c) specifically states that "no person shall discharge or in any manner discriminate against any employee" because the employee has exercised rights under the Act. Section 3(4) of the Act defines "person" as "one or more individuals, partnerships, associations, corporations, business trusts, legal representatives, or any group of persons." Consequently, the prohibitions of section 11(c) are not limited to actions taken by employers against their own employees. A person may be chargeable with discriminatory action against an employee of another person. Section 11(c) would extend to such entities as organizations representing employees for collective bargaining purposes, employment agencies, or any other person in a position to discriminate against an employee. See, Meek v. United States, 136 F. 2d 679 (6th Cir., 1943); Bowe v. Judson C. Burns, 137 F. 2d 37 (3rd Cir., 1943).

§ 1977.5 Persons protected by section 11(c).

(a) All employees are afforded the full protection of section 11(c). For purposes of the Act, an employee is defined as "an employee of an employer who is employed in a business of his employer which affects commerce." The Act does not define the term "employ." However, the broad remedial nature of this legislation demonstrates a clear congressional intent that the existence of an employment relationship, for purposes of section 11(c), is to be based upon

economic realities rather than upon common law doctrines and concepts. See, U.S. v. Silk, 331 U.S. 704 (1947); Rutherford Food Corporation v. McComb, 331 U.S. 722 (1947).

(b) For purposes of section 11(c), even an applicant for employment could be considered an employee. See, NLRB v. Lamar Creamery, 246 F. 2d 8 (5th Cir., 1957). Further, because section 11(c) speaks in terms of any employee, it is also clear that the employee need not be an employee of the discriminator. The principal consideration would be whether the person alleging discrimination was an "employee" at the time of engaging in protected activity.

(c) In view of the definitions of "employer" and "employee" contained in the Act, employees of a State or political subdivision thereof would not ordinarily be within the contemplated coverage of section 11(c).

§ 1977.6 Unprotected activities distinguished.

(a) Actions taken by an employer or others, which adversely affect an employee may be predicated upon nondiscriminatory grounds. The proscriptions of section 11(c) apply when the adverse action occurs because the employee has engaged in protected activities. An employee's engagement in activities protected by the Act does not automatically render him immune from discharge or discipline for legitimate reasons, or from adverse action dictated by non-prohibited considerations. See, NLRB v. Dixie Motor Coach Corp., 128 F. 2d 201 (5th Cir., 1942).

(b) At the same time, to establish a violation of section 11(c), the employee's engagement in protected activity need not be the sole consideration behind discharge or other adverse action. If protected activity was a substantial reason for the action, or if the discharge or other adverse action would not have taken place "but for" engagement in protected activity, section 11(c) has been violated. See, Mitchell v. Goodyear Tire & Rubber Co., 278 F. 2d 562 (8th Cir., 1960); Goldberg v. Bama Manufacturing, 302 F. 2d 152 (5th Cir., 1962). Ultimately, the issue as to whether a discharge was because of protected activity will have to be determined on the basis of the facts in the particular case.

SPECIFIC PROTECTIONS

§ 1977.9 Complaints under or related to the Act.

(a) Discharge of, or discrimination against, an employee because the employee has filed "any complaint * * * under or related to this Act * * *" is prohibited by section 11(c). An example of a complaint made "under" the Act would be an employee request for inspection pursuant to section 8(f). However, this would not be the only type of complaint protected by section 11(c). The range of complaints "related to" the Act is commensurate with the broad remedial purposes of this legislation and the sweeping scope of its application, which entails the full extent of the commerce power. (See Cong. Rec., vol. 116 p. P. 42206 Dec. 17, 1970).

(b) Complaints registered with other Federal agencies which have the authority to regulate or investigate occupational safety and health conditions are complaints "related to" this Act. Likewise, complaints made to State or local agencies regarding occupational safety and health conditions would be "related to" the Act. Such complaints, however, must relate to conditions at the workplace, as distinguished from complaints touching only upon general public safety and health.

(c) Further, the salutary principles of the Act would be seriously undermined if employees were discouraged from lodging complaints about occupational safety and health matters with their employers. (Section 2(1), (2), and (3)). Such complaints to employers, if made in good faith, therefore would be related to the Act, and an employee would be protected against discharge or discrimination caused by a complaint to the employer.

§ 1977.10 Proceedings under or related to the Act.

(a) Discharge of, or discrimination against, any employee because the employee has "instituted or caused to be instituted any proceeding under or related to this Act" is also prohibited by section 11(c). Examples of proceedings which could arise specifically under the Act would be inspections of worksites under section 8 of the Act, employee contest of abatement date under section 10(c) of the Act, employee initiation of proceedings for promulgation of an occupa-

tional safety and health standard under section 6(b) of the Act and part 1911 of this chapter, employee application for modification of revocation of a variance under section 6(d) of the Act and part 1905 of this chapter, employee judicial challenge to a standard under section 6(f) of the Act and employee appeal of an Occupational Safety and Health Review Commission order under section 11(a) of the Act. In determining whether a "proceeding" is "related to" the Act, the considerations discussed in § 1977.9 would also be applicable.

(b) An employee need not himself directly institute the proceedings. It is sufficient if he sets into motion activities of others which result in proceedings under or related to the Act.

§ 1977.11 Testimony.

Discharge of, or discrimination against, any employee because the employee "has testified or is about to testify" in proceedings under or related to the Act is also prohibited by section 11(c). This protection would of course not be limited to testimony in proceedings instituted or caused to be instituted by the employee, but would extend to any statements given in the course of judicial, quasi-judicial and administrative proceedings, including inspections, investigations, and administrative rule making or adjudicative functions. If the employee is giving or is about to give testimony in any proceeding under or related to the Act, he would be protected against discrimination resulting from such testimony.

§ 1977.12 Exercise of any right afforded by the Act.

(a) In addition to protecting employees who file complaints, institute proceedings, or testify in proceedings under or related to the Act, section 11(c) also protects employees from discrimination occurring because of the exercise "of any right afforded by this Act." Certain rights are explicitly provided in the Act; for example, there is a right to participate as a party in enforcement proceedings (sec. 10). Certain other rights exist by necessary implication. For example, employees may request information from the Occupational Safety and Health Administration; such requests would constitute the exercise of a right afforded by the Act. Likewise, employees interviewed by agents of the Secretary in the course of inspections or investigations could not subsequently be discriminated against because of their cooperation.

(b)(1) On the other hand, review of the Act and examination of the legislative history discloses that, as a general matter, there is no right afforded by the Act which would entitle employees to walk off the job because of potential unsafe conditions at the workplace. Hazardous conditions which may be violative of the Act will ordinarily be corrected by the employer, once brought to his attention. If corrections are not accomplished, or if there is dispute about the existence of a hazard, the employee will normally have opportunity to request inspection of the workplace pursuant to section 8(f) of the Act, or to seek the assistance of other public agencies which have

responsibility in the field of safety and health. Under such circumstances, therefore, an employer would not ordinarily be in violation of section 11(c) by taking action to discipline an employee for refusing to perform normal job activities because of alleged safety or health hazards.

(2) However, occasions might arise when an employee is confronted with a choice between not performing assigned tasks or subjecting himself to serious injury or death arising from a hazardous condition at the workplace. If the employee, with no reasonable alternative, refuses in good faith to expose himself to the dangerous condition, he would be protected against subsequent discrimination. The condition causing the employee's apprehension of death or injury must be of such a nature that a reasonable person, under the circumstances then confronting the employee, would conclude that there is a real danger of death or serious injury and that there is insufficient time, due to the urgency of the situation, to eliminate the danger through resort to regular statutory enforcement channels. In addition, in such circumstances, the employee, where possible, must also have sought from his employer, and been unable to obtain, a correction of the dangerous condition.

[38 FR 2681, Jan. 29, 1973, as amended at 38 FR 4577, Feb. 16, 1973]

☆ U. S. GOVERNMENT PRINTING OFFICE: 1979 265469 18

Supreme Court, U. S.
FILED
JUL 14 1978
MICHAEL RODAK, JR., CLERK

No. 77-1697

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

RAY MARSHALL, SECRETARY OF LABOR, PETITIONER

v.

DANIEL CONSTRUCTION COMPANY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR DANIEL CONSTRUCTION COMPANY IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. 1a-40a) is reported at 563 F.2d 707. The opinion of the district court (Pet. 45a-48a) is not officially reported.

JURISDICTION

The judgment of the court of appeals was entered on November 21, 1977, and petitions for rehearing and rehearing *en banc* were denied on December 30, 1977 (Pet. 41a-44a). The petition for a writ of certiorari was filed on May 26, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Secretary of Labor exceeded his authority in promulgating a regulation pursuant to the provisions of the Occupational Safety and Health Act of 1970, which grants to employees a new right to refuse to perform assigned tasks, without resort to the expressly established statutory procedure, based on the employee's own subjective determination that he or she would be exposed to a dangerous condition.

STATUTE INVOLVED

The relevant provision of the Occupational Safety and Health Act of 1970 (84 Stat. 1590, 29 U.S.C. 651 et. seq.) provides, in pertinent part (29 U.S.C. 660 (c)(1)):

> (c)(1) No person shall discharge or in any manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this Act or has testified or is about to testify in any such proceeding or because of the exercise by such employee on behalf of himself or others of any right afforded by this Act.

STATEMENT

This action was initiated by the Secretary of Labor under Section 11(c)(1) of the Occupational Safety and Health Act of 1970 (29 U.S.C. 660(c)(1); hereinafter "the Act"), and regulations promulgated thereunder. This section prohibits an employer from discharging or in any manner discriminating against any employee "because of the exercise by such employee . . . of any right afforded by this Act." The Secretary alleged that respondent unlawfully discharged one of its employees for refusing to perform a particular assignment believed by the employee to present a dangerous situation, and that said discharge was in retaliation for the exercise by the employee of a right "afforded by this Act."

In support of his allegation, the Secretary relied on regulations promulgated by him interpreting Section 11 (c)(1) of the Act. In pertinent part the regulation, published at 29 C.F.R. 1977.12 (Pet. 49a-58a) provides:

> (b)(1) On the other hand, review of the Act and examination of the legislative history discloses that, as a general matter, there is no right afforded by the Act which would entitle employees to walk off the job because of potential unsafe conditions at the workplace. Hazardous conditions which may be violative of the Act will ordinarily be corrected by the employer, once brought to his attention. If corrections are not accomplished, or if there is dispute about the existence of a hazard, the employee will normally have opportunity to request inspection of the workplace pursuant to section 8(f) of the Act, or to seek the assistance of other public agencies which have responsibility in the field of safety and health. . .
>
> (2) However, occasions might arise when an employee is confronted with a choice between not performing assigned tasks or subjecting himself to serious injury or death arising from a hazardous condition at the workplace. If the employee, with no reasonable alternative, refuses in good faith to expose himself to the dangerous condition, he would be protected against subsequent discrimination. The conditions causing the employee's apprehension of death or injury must be of such a nature that a reasonable person, under the circumstances then confronting the employee, would conclude that there is a real danger of death or serious injury, and that there is insufficient time due to the urgency of the situation, to eliminate the danger through resort to regular statutory enforcement channels. In addition, in such circumstances, the employee, where possible, must also have sought from his employer, and been unable to obtain a correction of the dangerous condition.

Considering the foregoing, the district court dismissed the complaint, reaching the "inescapable" conclusion that "no claim for relief has been stated here." (Pet. 48a). The court noted that the statute provided an express method for dealing with threat of imminent danger and that the complaint failed to allege whether the employee in this case followed that procedure. The court concluded that "Congress faced the situation such as presented in this suit and it supplied a specific remedy, however inadequate it might be viewed by some." (Pet. 48a).The court thus declined "to expand or rewrite legislation passed by Congress." (Id.).

A divided court of appeals affirmed the decision of the district court, noting that "our examination of the statutory scheme and the legislative history of the Act compels the conclusion that . . . the regulation is invalid because it is beyond the Secretary's grant of authority under the enabling provision." (Pet. 7a). In applying what even the dissenting opinion called "a properly deferential standard for our review of the Secretary's interpretation of the Act" (Id. 27a), the majority concluded that Congress established an express statutory procedure to deal with the situation here presented in lieu of the implied "right" granted by the Secretary in his regulation.

In reaching this conclusion, the court made two specific findings. First, it noted that the Act grants numerous rights to employees so that they may "play an integral role in achieving the salutary purpose of assuring safe and healthful working conditions, in relation to preventing imminent dangers." (Id. 10a). However, in detailing these rights the court correctly observed that "[a]t no point does the Act permit workers to make a determination that a dangerous condition exists *in fact* and that their employment or their employer's business operations may be halted by their refusal to work." (Id. 11a). Secondly, the court reviewed the legislative history of the Act and determined that Congress specifically considered, and ultimately rejected, provisions which would have given to

employees a right equivalent to that provided for in the Secretary's regulation. (Id. 12a-18a). One of the provisions considered by Congress would have entitled employees to absent themselves from the job with pay when exposed to conditions believed to be dangerous to health (Id. 13a), while another would have permitted a federal inspector to issue an administrative order restraining an employer's business operations for up to 72 hours if the inspector believed an imminent danger existed. (Id. 16a-17a).

After noting the reasons stated by Congress for rejecting these provisions, the court concluded that "[i]n lieu of providing workers with the right to 'strike with pay,' . . . [and] granting workers this right to request inspections Congress adopted a procedure that permitted workers to participate in the enforcement efforts under the Act." (Id. 19a). Moreover, the court determined that the Secretary's regulation "expressly confers upon employees a right that Congress deliberately chose not to grant to OSHA inspectors: the right to determine *in fact* that an employment practice or condition presents" a dangerous situation for which normal statutory procedures will not suffice. (Id. 20a). In addition, the court found that by permitting employees to refuse to work upon making such a determination, the regulation grants to employees an additional "right which Congress . . . deliberately withheld from OSHA inspectors," that being the power to enjoin all or part of an employer's business which Congress placed exclusively in the courts (Id.).

In his dissenting opinion, Judge Wisdom notes that the regulation in question "can be interpreted as embodying one of the 'other rights' mentioned in 11(c)(1),[1] a right to safe conditions implicit in the entire law." (Id. 29a). He felt that the

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[1] The Judge's use of quotation marks around the phrase "other rights" is puzzling, since that phrase does not appear at all in Section 11(c)(1). The Section protects employees in the "exercise by such employee on behalf of himself or others of any right afforded by this Act."

regulation filled a gap between the time necessary to implement the Act's specific provisions for dealing with imminent dangers and the immediacy of the situation with which an employee is confronted. (Id. 28a). Although the regulation itself is silent on the subject, the Judge concluded that ". . . apparently, the worker is neither entitled to receive pay while not working, nor privileged to refuse alternative, safe work." (Id. 29a). Thus he found the protection "limited." (Id.)

Finally, the Judge disagreed with the majority's interpretation of the legislative history, concluding that the provisions rejected by Congress were not equivalent to the right granted by the Secretary's regulation. Moreover, he determined that Congress' refusal to give certain powers to federal inspectors did not imply that such rights were to be denied to employees (Id. 32a-36a).

REASONS FOR DENYING THE PETITION

1. The decision of the court of appeals that the regulation in question is clearly inconsistent with the express language of the statute, and with congressional intent as manifested in the legislative history, is correct and warrants no further review. Indeed, in so holding the court merely gives recognition to the established principle that where an inconsistency between the regulation and the statute is so patent, a court has no choice but to hold that the administrator has exceeded his authority and employed means not appropriate to the end specified in the Act. See, e.g. *Gardner v. United States* 239 F.2d 234 (5th Cir. 1976); see, also, *Commissioner of Internal Revenue v. South Texas Lumber Company,* 333 U.S. 496 (1941).

The existence of such an inconsistency in the situation here presented is amply supported. The Secretary's own interpretation of the protections afforded by Section 11(c)(1) begins with the revealing statement that ". . . review of the Act and examination of the legislative history discloses that, as a

general matter, there is no right afforded by the Act which would entitle employees to walk off the job because of potential unsafe conditions at the workplace." 29 C.F.R. 1977.12(b)(1). The court, after conducting an exhaustive review of the Act's specific provisions and the legislative history, agreed with this interpretation and simply refused to permit the Secretary to accomplish administratively what Congress expressly denied him legislatively.

In reaching this conclusion the court relied primarily on two events which are clearly dispositive of the issue. First, the House substituted a bill which did not contain a "strike with pay" provision for one which would have permitted employees to absent themselves with pay when exposed to a dangerous health hazard. The House then acceded to the Senate passed bill which, as its principal sponsor noted, contained an express employee right to request expedited inspections in lieu of a "strike with pay" provision. (Pet. App. 12a-15a). As the court noted, ". . . .the wholesale rejection of the provision demonstrates that an overriding concern of Congress was its fear that workers might abuse the rights granted and disrupt or terminate their employer's business operations as a form of intimidation or harassment." (Pet. App. 18a-19a).

Second, the court detailed the ultimate rejection of a provision which would have permitted a federal inspector to shut down all or part of an employer's business that he or she believed to present an imminent danger. Instead, "Congress gave the federal courts the sole authority to enjoin. . . an employer's business and then only to the extent necessary to eradicate the imminent danger." (Id.). The court thus concluded that Congress did not intend to grant to employees a right specifically denied to those responsible for the enforcement of the Act. Rather, the court determined that Congress established an express statutory procedure "that would prevent the potential for abuse from the worker's indiscriminate exercise of his right and avoid unnecessary confrontations . . .which might cause a disruption of the employer's business operations." (Id. 19a).

That the Secretary's regulation provides the basis for potential abuse circumscribed by Congress or, at best, grounds for endless litigation, is obvious. It permits an employee to subjectively determine that a dangerous situation exists, and to walk off the job until the employee determines that the hazard has been abated, without even requiring the employee to resort to the statutory procedures available. An employer is thus faced with making the determination of whether the employee's refusal is in "good faith," whether his fears are "reasonable" and ultimately must either allow his operation to be suspended or face litigation. Surely, after examining the situation and determining that the employee's fears are groundless, an employer's decision to continue the work must be accorded "good faith." To hold otherwise would give credence to the suggestion that most employers operate in callous disregard for the health and safety of their employees. Congress itself refused to make this assumption noting that if employees informed their employers of an apparent hazardous condition then "99 times out of 100" the employer would correct it.[2] Where a "good faith" disagreement exists, then resort to the express statutory provisions is available, and is clearly protected activity. However, where Congress has given employers the benefit of the doubt, the courts must do likewise.

2. Nor is there any merit to petitioner's contention that the right granted in the regulation may be implied from the Act's overall purposes. Indeed, Congress' failure to include such a right in the Act becomes even more significant when contrasted with the express provisions for other varied, and numerous employee rights. These include *inter alia* the right to accompany inspectors during inspection (29 U.S.C. 657(e)); the right to file complaints or notify the Secretary of an alleged violation (29 U.S.C. 657(f)(1)(2)); the right to participate as a party at hearings and to challenge abatement periods (29 U.S.C.

[2] See 116 Cong. Rec. 38, 367-386; 116 Cong. Rec. 37, 327-346 (1970).

659(c)); the right to appeal adverse decisions (29 U.S.C. 660(a)); and the right to challenge OSHA standards (29 U.S.C. 655(f)).

The maxim of statutory construction *expressio unis est exclusio alterius* seems particularly applicable here. Congress was fully aware of employee rights when it drafted the Act, was capable of providing for a right identical to that contained in the regulation, but did not do so. In similar statutes where Congress wished to provide for such rights, it can and has done so.

For example, Section 502 of the Labor Management Relations Act, 29 U.S.C. 143, provides that "the quitting of labor by an employee . . . in good faith because of abnormally dangerous conditions for work at the place of employment . . . [shall not] be deemed a strike under this chapter." Clearly, Congress could have employed similar language to make the discharge of an employee a discriminatory act.

Similarly, in the recently enacted Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et. seq., Congress expressly granted to the Secretary the right to order a shut down of a mine administratively, and to order the withdrawal of employees from the mine with pay, a right expressly denied under the Act. The power to order such withdrawal with pay is not limited to imminently dangerous situations, but includes non-abatement of hazardous condition, "unwarrantable failures" to comply with standards, and even violation of a miner's training requirements. 30 U.S.C. 814(b)-(h), 817. The amount of pay a miner is to receive when a withdrawal order is issued is also specified. 30 U.S.C. 814(g)(2), 821.

Thus, the court below, after due consideration of the Act, its legislative history, and the policy issues raised was correct in holding that the regulation promulgated by petitioner would effectively amend the Act by providing that which Congress did not, and that petitioner's arguments could not suffice as a basis for amendment of the Act by the judiciary.

3. Nor is there merit to petitioner's contention, accepted in the dissenting opinion (Pet. App. 32a-33a), that Congressional concern over the "strike with pay" provision is irrelevant to the regulation here in issue. Indeed, the position urged by the petitioner and the dissenting judge that an employee must be prepared to forego pay if necessary to escape the hazard, is completely contradictory to the interpretation of Section 11(c)(1) adopted by the petitioner. Clearly, if the employee has a "right" to refuse to work in the presence of a hazardous condition, then the denial of pay to an employee who exercises that right would certainly be considered to have a "chilling effect" on that right, and be considered discriminatory "in any manner" under Section 11(c)(1).

In support of the above, it must be noted that the Secretary has recently issued an interpretive rule amending a regulation, which states that any failure by employers to pay employees for time spent accompanying an OSHA inspector during an inspection, would be discrimination under Section 11(c) of the Act. (42 Fed. Reg. 47344, amending 29 C.F.R. 1977.21.)[3] This new interpretation is a complete reversal of the previous position taken by the Secretary, which held that such time was not compensable because the activity was not normal work activity. (See, 38 Fed. Reg. 2681, Jan. 29, 1973).

If the Secretary now feels that the denial of pay to employees who exercise their "walkaround" right is discriminatory, then he cannot seriously assert that there is a distinction between that right and the right to refuse to work under conditions established by the regulation. Thus, the Secretary does, indeed, set up the potential for a "strike with pay" which Congress rejected.

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[3] This interpretation has been challenged in a suit now pending before the United States District Court for the District of Columbia. *Chamber of Commerce of the United States v. O.S.H.A.*, Civ. Action No. 77-1842.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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